United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

227

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,476

RADIO ATHENS, INC. (WATH),

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

VALLEY BROADCASTING, INC.,

Intervenor.

Appeal from Memorandum Opinion and Order of the
Federal Communications Commission

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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JOINT APPENDIX

INDEX

JOINT APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RADIO ATHENS, INC. (WATH) Appellant,	
vs.	Case No. 21476
FEDERAL COMMUNICATIONS COMMISSION Appellee	
VALLEY BROADCASTING, INC. Intervenor	

PREHEARING STIPULATION

Where Appellant, the licensee of Standard Broadcast Station WATH, Athens, Ohio, timely tendered an application for an increase in power of Station WATH prior to a "cut-off" date established by the FCC:

1. Whether the Commission erred in returning the WATH application without a hearing as not acceptable for filing for violation of the duopoly rule (Section 73.35(a) of the Commission's Rules)

2. Whether the Commission erred in again rejecting the application upon retender on the grounds that the information filed was after the "cut-off" date.

FILING OF JOINT APPENDIX

Counsel for the parties further stipulate that the joint appendix will be filed simultaneously with the filing of the reply brief, or if Appellant files no reply brief, then within 15 days of the filing of the brief of Appellee.

References to the record appearing in the various briefs of the parties shall be to the page numbers in the original record certified to this Court. In the printing of the joint appendix there will be set forth, in addition to the consecutive numbering of the pages of the joint appendix, the original record page numbers in bold type and indented in a manner which will render it convenient for the Court to locate the pages referred to in the brief.

Respectfully submitted,

/s/ Lauren A. Colby
Counsel for Appellant

/s/ John J. Conlin,
Counsel for Appellee

/s/ Grover C. Cooper
Counsel for Intervenor

December 27, 1967

Before: Leventhal, Circuit Judge,
in Chambers.

PREHEARING ORDER

Counsel for the parties in the above-entitled case having submitted their stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is approved, and it is

ORDERED that the stipulation shall control further proceedings in this case unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix herein.

---

[30]

May 10, 1967

Mr. Ben F. Waple
Federal Communications Commission
Benjamin Franklin Post Office Bldg.
Washington, D. C.

Dear Mr. Waple:

There is enclosed herewith copies of FCC form 301 and associated data for power increase of Radio Station WATH.

Also enclosed is a check for $50.00 to cover filing charges.

Sincerely,

/s/ A. H. Kovlan
President, Radio Athens, Inc.

AHK:M

(31)

rm 301
1965

Form Approved
Budget Bureau No. 52-R014.19

Section I

UNITED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSION

APPLICATION FOR AUTHORITY TO CONSTRUCT A NEW BROADCAST STATION OR MAKE CHANGES IN AN EXISTING BROADCAST STATION

INSTRUCTIONS

A. This form is to be used in applying for authority to construct a new standard, commercial FM, or television broadcast station, or to make changes in existing broadcast stations. This form consists of this part, Section I, and the following sections:

Section II, Legal Qualifications of Broadcast Applicant
ction III, Financial Qualifications of Broadcast Applicant
Section IV-A, Statement of Program Service of Broadcast Applicant (AM-FM)
Section IV-B, Statement of Program Service of Broadcast Applicant (TV)
Section V-A, Standard Broadcast Engineering Data
Section V-B, FM Broadcast Engineering Data
Section V-C, Television Broadcast Engineering Data
Section V-G, Antenna and Site Information

B. Prepare three copies of this form and all exhibits. Sign one copy of Section I. Prepare one additional copy (four) of Section V-G and associated exhibits. File above with the Federal Communications Commission, Washington, D. C. 20554. A SEPARATE AND COMPLETE APPLICATION (IN TRIPLICATE) MUST BE FILED FOR EACH AM STATION, EACH FM STATION, AND EACH TV STATION.

C. Number exhibits serially in the space provided in the body of the form and list each exhibit in the space provided on page 2 of this Section. Show date of preparation of each exhibit, antenna pattern, and map, and show date when each photograph was taken.

D. The name of the applicant stated in Section I hereof shall be the exact corporate name, if a corporation; if a partnership, the names of all partners and the name under which the partnership does business; if an unincorporated association, the name of an executive officer, his office, and the name of the association. In other Sections of the form the name alone will be sufficient for identification of the applicant.

E. Information called for by this application which is already on file with the Commission *(except that called for in Section V-C)* need not be refiled in this application provided (1) the information is now on file in another application or FCC Form filed by or on behalf of this applicant; (2) the information is identified FULLY by reference to the file number (if any) the FCC form number, and the filing date of the application or other form containing the information and the page or paragraph referred to, and (3) after making the reference, the applicant states: "No change since date of filing." Any such reference will be considered to incorporate into this application all information, confidential or otherwise, contained in the application or other form referred to. The incorporated application or other form will thereafter, in its entirety, be open to the public. (See Section 1.526 of the Commission's Rules and Regulations, "Records to be maintained locally for public inspection by applicants, permittees, and licensees.")

F. This application shall be personally signed by the applicant, if the applicant is an individual; by one of the partners, if the applicant is a partnership; by an officer, if the applicant is a corporation; by a member who is an officer, if the applicant is an unincorporated association; by such duly elected or appointed officials as may be competent to do so under the laws of the applicable jurisdiction, if the applicant is an eligible government entity; or by the applicant's attorney in case of the applicant's physical disability or of his absence from the United States. The attorney shall, in the event he signs for the applicant, separately set forth the reason why the application is not signed by the applicant. In addition, if any matter is stated on the basis of the attorney's belief only (rather than his knowledge), he shall separately set forth his reasons for believing that such statements are true.

G. Before filling out this application, the applicant should familiarize himself with the Communications Act of 1934, as amended, Parts 1, 2, 73 and 17 of the Commission's Rules and Regulations and the Standards of Good Engineering Practice.

H. BE SURE ALL NECESSARY INFORMATION IS FURNISHED AND ALL PARAGRAPHS ARE FULLY ANSWERED. IF ANY PORTIONS OF THE APPLICATION ARE NOT APPLICABLE, SPECIFICALLY SO STATE. DEFECTIVE OR INCOMPLETE APPLICATIONS MAY BE RETURNED WITHOUT CONSIDERATION.

RECEIVED
MAY 1967
FCC
MAIL ROOM

File No.

1. Name of applicant (See Instruction D)
Radio Athens, Inc.

Street Address Box 708

City Athens | State Ohio | ZIP CODE 4570

2. Name of person to whom communications should be sent, if different from item 1

Street Address ---

City --- | State --- | ZIP CODE

3. Purpose of application (check one)
☐ New Station ☒ Change existing station facilities

4. (a) Requested facilities
Type of station (as Standard, FM, Television) Standard

Frequency	Call	Channel No.	Power in kilowatts: Night	Power in kilowatts: Day	Minimum hours operation daily
970 KHz	WATH			5 KW	12

Hours of operation

Unlimited	Daytime only	Limited	Sharing with (Specify Stations)	Other (Specify)
X.				

Station location

City	State

(b) If this application is for changes in an existing authorization, complete Section I and any other sections necessary to show all substantial changes in information filed with the Commission in prior applications or reports. In the spaces below check Sections submitted herewith and as to Sections not submitted herewith refer to the prior application or report containing the requested information in accordance with Instruction E. If contemplated expenditures are less than $5,000, complete paragraph 1 of Section III only. Section IV is not required for applications for minor changes not involving change in power, change in frequency, change in hours of operation, or moving from city to city.)

Section No. Para. No. Reference (File or Form No. and Date)

☐ Section II
☐ Section III
☒ Section IV
☐ Section V

Have there been any substantial changes in the information incorporated in this application by reference in this paragraph? Yes ☐ No ☐

3. If this application is contingent on the grant of another pending application, state name of other applicant and file number of other application.

None

FOR COMMISSION USE ONLY

Instructions, General Information and Definitions

None of this section applicable

1. *Applicants for new AM or FM stations* shall file this Section IV-A with respect to Ascertainment of Program Needs (Part I), Proposed Programming (Part III), Proposed Commercial Practices (Part V), General Station Policies and Practices (Part VI) and Other Matters and Certification (Part VII).

2. *Applicants for major changes in facilities* (as defined in Sections 1.571(a)(1) and 1.573(a)(1) of the Commission's Rules) need not file this Section IV-A unless a substantial change in programming is proposed or unless the infomation is requested by the Commission.

3. A. The replies to the following questions constitute representations on which the Commission will rely in considering this application. Thus time and care should be devoted to the replies so that they will reflect accurately applicant's responsible consideration of the questions asked. It is not, however, expected that the licensee will or can adhere inflexibly in day-to-day operation to the representations made herein.

   B. Replies relating to future operation constitute representations against which the subsequent operation of the station will be measured. Accordingly, if during the license period the station substantially alters its programming format or commercial practices, the licensee should notify the Commission of such changes; otherwise it is presumed the station is being operated substantially as last proposed.

4. The applicant's attention is called to the Commission's "Report and Statement of Policy re: Commission En Banc Programming Inquiry," released July 29, 1960. (FCC 60-970; 25 Federal Register 7291; 20 Pike and Fischer Radio Regulation 1902), copies of which are available upon request to the Commission; and also to the material contained in Attachment A to this Section.

5. A legible copy of this Section IV-A and the exhibits submitted therewith shall be kept on file available for public inspection at any time during regular business hours. It shall be maintained at the main studio of the station or any other accessible place (such as a public registry for documents or an attorney's office) in the community to which the station is or is proposed to be licensed.

6. *Network Programs.* Where information for the composite week is called for herein with respect to commercial matter or program type classification in connection with national network programs, the applicant may rely on infomation furnished by the network.

7. *Signature.*

   This Section IV-A shall be signed in the space provided at the end hereof. It shall be personally signed by the applicant, if the applicant is an individual; by one of the partners, if the applicant is a partnership; by an officer of applicant, if a corporation or association. ***SIGNING OF THIS SECTION IS A REPRESENTATION THAT THE PERSON WHO SIGNS IS FAMILIAR WITH THE CONTENTS OF THIS SECTION AND ASSOCIATED EXHIBITS, AND SUPPORTS AND APPROVES THE REPRESENTATIONS THEREIN ON BEHALF OF THE APPLICANT.***

Definitions

The definitions set out below are to be followed in furnishing the information called for by the questions of this Section IV-A. The inclusion of various types and sources of programs in the paragraphs which follow is not intended to establish a formula for station operation, but is a method for analyzing and reporting station operation.

10. *Sources* of programs are defined as follows:

   (a) *A local program* (L) is any program originated or produced by the station, or for the production of which the station is primarily responsible, and employing live talent more than 50% of the time. Such a program, taped or recorded for later broadcast, shall be classified as local. A local program fed to a network shall be classified by the originating station as local. All non-network news programs may be classified as local. Programs primarily featuring records or transcriptions shall be classified as recorded even though a station announcer appears in connection with such material. However, identifiable units of such programs which are live and separately logged as such may be classified as local (e.g., if during the course of a program featuring records or transcriptions a non-network 2-minute news report is given and logged as a news program, the report may be classified as local).

   (b) *A network program* (NET) is any program furnished to the station by a network (national, regional or special). Delayed broadcasts of programs originated by networks are classified as network.

   (c) *A recorded program* (REC) is any program not defined above, including, without limitation, those using recordings, transcriptions, or tapes.

11. *Types* of programs are defined as follows:

   If a program contains two or more identifiable units of program material which constitute different program types as herein defined, each such unit may be separately logged and classified.

   The definitions of the first eight types of programs, (a) through (h) are not intended to overlap each other, and these types will normally include all the programs broadcast. The programs classified under (i) through (k) will have been classified under the first eight and there may be further duplication among types (i) through (k).

   (a) *Agricultural programs* (A) include market reports, farming or other information specifically addressed, or primarily of interest, to the agricultural population.

(31) 4

rm 301
1965

Form Approved
Budget Bureau No. 52-R014.19

Section I

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FEDERAL COMMUNICATIONS COMMISSION

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D. The name of the applicant stated in Section I hereof shall be the exact corporate name, if a corporation; if a partnership, the names of all partners and the name under which the partnership does business; if an unincorporated association, the name of an executive officer, his office, and the name of the association. In other Sections of the form the name alone will be sufficient for identification of the applicant.

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MAY 1967 RECEIVED FCC MAIL & FILES

File No.

1. Name of applicant (See Instruction D)

Radio Athens, Inc.

Street Address Box 708

City	State	ZIP CODE
Athens	Ohio	4570[illegible]

2. Name of person to whom communications should be sent, if different from item 1

Street Address ---

City	State	ZIP CODE
----	---	

3. Purpose of application (check one)

X
☐ New Station ☐ Change existing station facilities

4. (a) Requested facilities

Type of station (as Standard, FM, Television)
Standard

Frequency	Call	Channel No.	Power in kilowatts		Minimum hours operation daily
			Night	Day 5 KW	
970 Khz	WATH				12

Hours of operation

Unlimited	Sharing with (Specify Stations)	Other (Specify)
Daytime only X.		
Limited		

Station location

City	State

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PRESENT 0.5MV/M

PRESENT 2 MV/M

PRESENT 5 MV/M

Statute Miles 10 0 10 20 30

5, 2 AND 0.5 PRESENT

WATH ATHENS, OHI

970 KHz 5 KW DA-

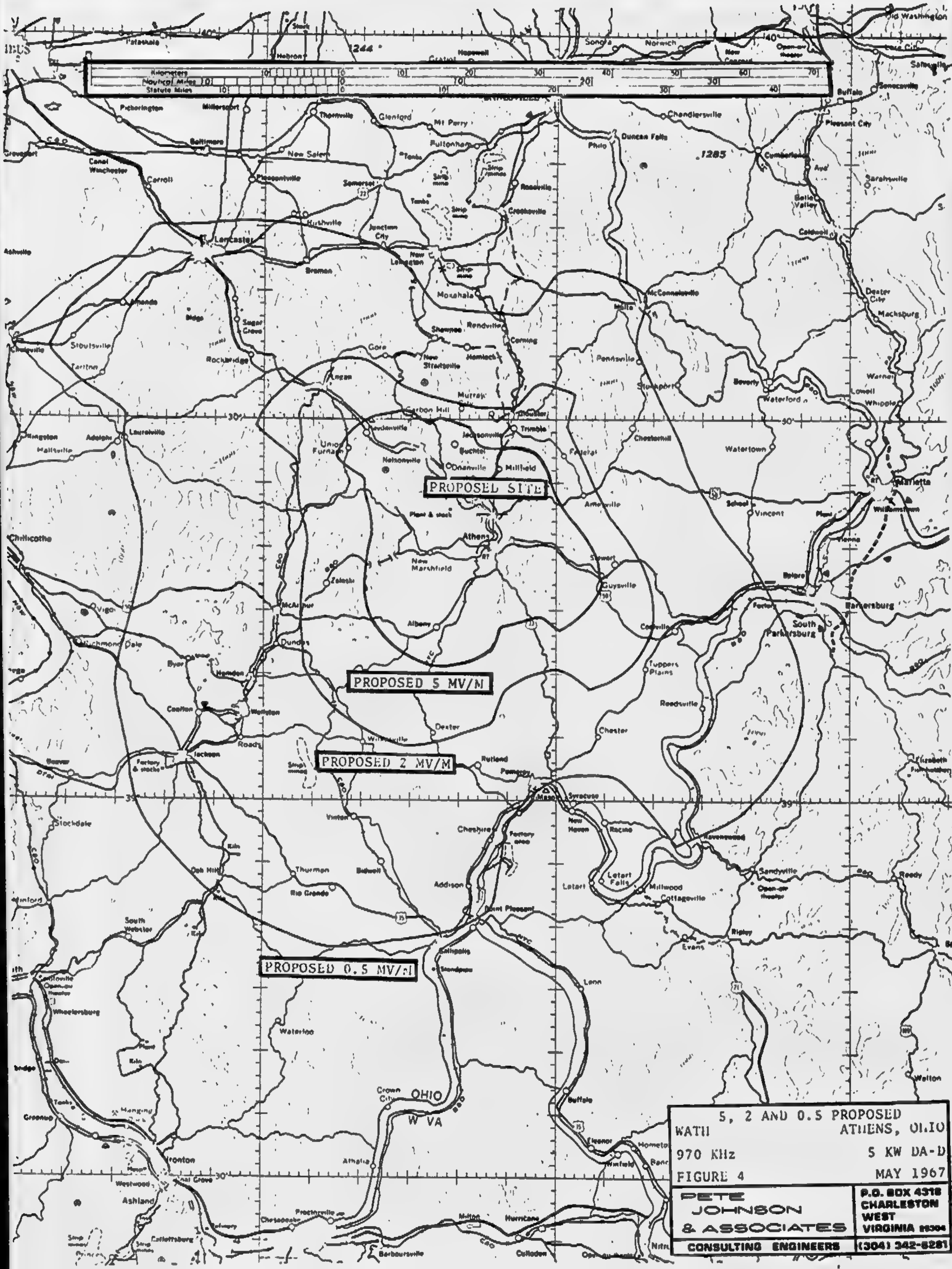
FIGURE 3 MAY 196

PETE JOHNSON & ASSOCIATES

CONSULTING ENGINEERS

P.O. BOX 4311
CHARLESTON
WEST
VIRGINIA

(304) 342-82


Kilometers
Nautical Miles
Statute Miles
PROPOSED SITE
PROPOSED 5 MV/M
PROPOSED 2 MV/M
PROPOSED 0.5 MV/M
Athens
OHIO
W VA
5, 2 AND 0.5 PROPOSED
WATH
ATHENS, OHIO
970 KHz
5 KW DA-D
FIGURE 4
MAY 1967
PETE JOHNSON & ASSOCIATES
CONSULTING ENGINEERS
P.O. BOX 4318
CHARLESTON
WEST
VIRGINIA 25304
(304) 342-6281

June 1, 1967

Radio Athens, Inc.
Radio Station WATH
Box 708
Athens, Ohio 45701

Gentlemen:

Reference is made to your application, tendered for filing May 11, 1967, for a construction permit to increase power from 1 to 5 kilowatts, change antenna-transmitter location, and install a directional antenna system for Station WATH, Athens, Ohio.

The application is presently awaiting a preliminary study to determine whether it complies with the Commission's rules regarding acceptance. However, in accordance with our procedure regarding applications proposing new or modified directional antenna systems, the proposed antenna parameters have been analyzed by a computer to determine if they would depict the proposed radiation pattern. Results of this study indicate that the proposed antenna parameters would not produce values of radiation as indicated on your horizontal plans radiation pattern.

In order that study of your application will not be delayed when it is reached for consideration, an amendment should be filed to eliminate the discrepancy noted.

Very truly yours,

/s/ Ben F. Waple
Secretary

cc: Pete Johnson & Associates

LMC:paf/bf:F

[182]

[182]

June 12, 1967

Radio Athens, Inc.
Radio Station WATH
Box 708
Athens, Ohio 45701

Gentlemen:

Reference is made to your application tendered for filing May 11, 1967, for a construction permit to increase the power of Station WATH from 1 to 5 kilowatts.

Commission records indicate that A. H. Kovlan, 70 percent stockholder, president, and director of Radio Athens, Inc., is also treasurer, director, and 32.5 percent stockholder of Radio Mid-Pem, Inc., licensee of Station WMPO, Middleport, Ohio. Additionally, we note that R. J. Jones, secretary of Radio Athens, Inc., is also secretary, director, and 2.5 percent stockholder of Radio Mid-Pem, Inc., licensee of WMPO.

A study of your application indicates that increased overlap of 1.0 mv/m contours would occur with Station WMPO. Accordingly, your proposal is in violation of Section 73.35(a) of the Commission's Rules, and is hereby returned as not acceptable for filing. One copy is retained.

Very truly yours,

/s/ Ben F. Waple
Secretary

Enclosures

RHG:aaf/bf:B

RADIO ATHENS, INC. WATN

* * *

Post Office Box 708, Phone (614) 593-6651 Athens, Ohio

June 14, 1967

Mr. Ben Waple, Secretary
Federal Communications Commission
Washington, D. C. 20554

Dear Mr. Waple:

I am writing in regard to your letter of June 12, stating that my application is in violation of Section 73.25(A). I am aware of this.

I plan to sell all of the 32.5% of stock that I own in Radio Mid-Pom, Inc., License of station WMPO, Middleport, Ohio, as soon as I obtain a construction permit for 5 KW. In fact, just yesterday I met with the other stockholders and discussed the sales terms.

R. J. Jones is secretary of Radio Athens, Inc., but does not own any shares in the station; he is also our attorney and is willing to resign the position of secretary if necessary.

Enclosed you will find an additional check in the amount of $25.00, which was inadvertently short-changed the Commission. (Application for Major Change)

I am hereby sending the application back, requesting it be reinstated to its original date of May 10, 1967.

I hope this meets with your approval.

Very truly yours,

/s/ Andrew H. Kovlan
President

Enclosure
AHK:lrw

[189]

[189]

Before The
BROADCAST BUREAU
of the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In re application of RADIO ATHENS, INC. (WATH) Athens, Ohio For Construction Permit	)	File No. BP-(unassigned)

PETITION FOR RECONSIDERATION
OF ACTION TAKEN PURSUANT
TO DELEGATED AUTHORITY

Radio Athens, Inc. (hereinafter referred to as Athens), licensee of Radio Station WATH, Athens, Ohio, operating on 970kc, hereby petitions the Federal Communications Commission, pursuant to Section 1.106 of its Rules and Regulations, to reconsider and reverse its actions of June 12, 1967 returning the WATH application for construction permit to change facilities and increase power.

On May 11, 1967 Athens filed an application for a construction permit to increase the power of Radio Station WATH from one kilowatt to five kilowatts. On June 12, 1967 the Federal Communications Commission, through the authority delegated to the Chief of the Broadcast Bureau, returned the Athens application, citing Sections 73.35(a) of the Commission's Rules and Regulations. Presumably, this action rested on

the authority of Section 1.564 and Section 1.566 of the Rules and Regulations of the Federal Communications Commission. On June 14, 1967 the application was resubmitted by Athens along with a statement signed by Andrew H. Kovlan, the president of Athens, requesting that the application be reinstated to its May 11 filing date (the application was mailed by Athens on May 10, 1967, to the Federal Communications Commission, but was not received until May 11, 1967).

The Athens' application is mutually exclusive with an application filed by Valley Broadcasting, Inc. (hereinafter referred to as Valley), for a new standard broadcast station to be located in Nelsonville, Ohio, requesting operation on 940kc with 250 watts of power, DA/D, daytime. On April 11, 1967 the Commission placed the Valley application on a cut-off list, requiring that applications in conflict with Valley be substantially complete and filed by May 11, 1967. Since, in the opinion of both Athens and Valley, the 25mv/v contour of the proposed Athens' station will overlap the 25mv/v contour of the proposed Valley application, the two applications are in conflict, and are mutually exclusive.[1/]

1/ See June 20, 1967 letter from Grover C. Cooper, Esq. on behalf of Valley filed in this case.

[191]

On July 5, 1967, the Federal Communications Commission granted the Valley Broadcasting, Inc. application, without considering the Athens' application, or the letter from Andrew H. Kovlan, and

prior to the expiration to the thirty day period in which Athens could request reconsideration of the action returning its application.

Shortly, an appropriate pleading will be filed requesting the Commission to reconsider its action in granting the Valley Broadcasting, Inc. application, and requesting that the grant of the Valley application be set aside.

The action of the Commission's staff members, acting pursuant to delegated authority, in returning the Athens' application as unacceptable for filing was erroneous, rested on a misinterpretation of Section 1.566 and Section 73.35(a) of the Rules and Regulations of the Federal Communications Commission, and failed to consider the Commission's action of November 7, 1963 granting an application filed by Radio Mid-Pom, Inc. for an increase in power to 5 kilowatts of Radio Station WMPO, Pomeroy, Ohio, wherein the Commission determined that the cross-ownership interest involved were not sufficient to bar a grant under former Section 73.35(a). (See BP-15335)

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The president of Athens, Andrew H. Kovlan is a minority stockholder, officer and director of Radio Station WMPO, Pomeroy, Ohio, and is the majority stockholder, President, and a director of Athens. The 1mv/m contours of WMPO and WATH now overlap to a substantial degree, and the WATH application would increase the overlap.

Section 1.566 of the Rules and Regulations of the Federal Communications Commission empowers the Chief of the Broadcast Bureau to return applications which do not meet the requirements of the Commission's rules. That Section states

> "Applications which are determined to be patently not in accordance with the Commission's rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will be considered defective and will not be accepted for filing, or if inadvertently accepted for filing will be dismissed."

However, the Commission in adopting Section 1.361(c) of the Rules, now Section 1.566(a) specifically sought to clarify this Section to avoid the problems of misinterpretation. On November 13, 1953, at 18 FR 7195, the Commission stated

> "It [referring to the present Section 1.566(a)] is applicable only to applications which, because of the nature of the particular rule involved, can be patently seen to be in conflict with the rule. . . . Where the conflict

> can be determined only after a hearing evaluating various pertinent factors, this procedural provision is inapplicable." (Emphasis and editorial comment added)

Therefore, Section 1.566(a) of the rules empowers the Commission's staff to return an application only if the application contains a clear violation of the Commission's rules. The application as submitted does not contain a violation of Section 73.35(a), the Section cited by the staff returning the application, much less a clear violation of this Section.

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Prior to July 16, 1964, Section 73.35(a) contained a built-in waiver provision, where it appeared that the 1mv/m contours of commonly owned stations appeared to overlap. (Report and Order in Docket Number 14711, 2 RR2nd 1588, Note 1 at page 1590) On July 16, 1964, Section 73.35(a) was amended to eliminate, in most cases, the case-by-case built-in waiver aspects, and substituted a fixed rule. However, the fixed rule did not apply to cases where the 1mv/m contours of two existing, commonly owned standard broadcast stations overlap, as in this case, and one of the stations requests a change in facilities that will increase the existing overlap, again as in this case. Under such circumstances, the Commission stated that it ". . . will not grant the application if it finds that to do so would be against the public interest,

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convenience, and necessity." (Section 73.35(a) of the Rules and Regulations of the Federal Communications Commission, Note 3)

Nowhere in Section 73.35(a) of the Report and Orders adopting the Section does the Commission suggest that in cases where there will be an increase in the overlap of 1mv/m contours the increase will be patently against the rules. Rather, the Commission made it clear where there will be an increase in overlap, the Commission will grant the application if it finds that to do so would be in the public interest, convenience, and necessity. If the Commission is unable to make such a determination from the application as it is filed, the Commission must designate the application for a hearing. The application cannot, under Section 309 of the Communications Act of 1934, as amended, be returned without consideration.

Even though Section 1.566 of the Commission's rules is not applicable to this case, since the applicant was not required to request a waiver of Section 73.35(a), Section 73.35(a) itself is not applicable. Section 73.35(a) requires, as a condition precedent to its operation, that the applicant own, operate, or control another standard broadcast station where the 1mv/m contours of the stations would overlap. The Federal

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Communications Commission has already determined that Andrew H. Kovlan does not have a sufficient interest to come within the purview of the rule.[2/]

On January 22, 1962 Radio Mid-Pom, Inc., licensee of Radio Station WMPO, Pomeroy, Ohio, in which Mr. Kovlan owns an interest, filed an application with the Federal Communications Commission to increase the power of that station from one kilowatt to five kilowatts. The assigned file number was BP-15335. From the engineering data submitted with the application and the amendments thereto, it appeared that the service contours of WMPO and WATH would overlap. On April 1, 1963 the Commission wrote to Radio Mid-Pom, Inc. requesting additional details concerning the overlap. By an amendment dated May 20, 1963, Radio Mid-Pom, Inc., in reply to the Commission's April 1, 1963 letter, stated at paragraph three,

> "Mr. A. H. Kovlan, an officer and director of Radio Mid-Pom, Inc., and the holder of only 32.5% of its stock, is an officer and director of the licensee of radio station WATH, and holds 70% of its stock. This is the only common

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ownership between these stations. Mr. Kovlan can control the operation of WATH, but since he holds less than a majority of applicant's stock, he cannot control the operation of WMPO."

2/ Mr. R. J. Jones, the secretary of Radio Athen, Inc. is a minority stockholder in Radio Mid-Pom, Inc. He has no ownership interest in Radio Athens, Inc.

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The amendment concludes with a request that the Commission determine that "a grant of applicant's above captioned application will not result in violation of Section 3.35 [sic] of its rules. . . ." On November 7, 1963 the Federal Communications Commission granted the Radio Mid-Pom, Inc. application without comment. It is submitted that a grant of the WMPO application, with substantially the same ownership interest involved, constituted a finding by the Commission that Andrew H. Kovlan did not own a sufficient interest in Radio Mid-Pom, Inc. to bar a grant under Section 73.35(a).

Furthermore, a refusal to reconsider the action in returning the Athens' application, and refusal to reinstate the application to its May 11 filing date, will constitute the denial of an application without hearing, direct violation of Section 309 of the Communications Act of 1934, as amended. The Commission is required to grant applications if it finds that a grant of the application would serve the public interest, convenience, and necessity. However, if the Commission is unable to make such a finding from the application as it is submitted, or if substantial or material questions of fact exist, the Commission must designate the application for hearing. (Communications Act of 1934, as amended, Section 309(e))

If the application is not reinstated to the May 11 cut-off date, the applicant will be denied the required hearing. Substantial and material questions of fact do exist with regard to the control exercised by Andrew H. Kovlan over Radio Station WMPO, and, in order to determine whether Section 73.35(a) is applicable to the WATH application, the Commission must, if it is unable to find that a grant without a hearing is in the public interest designate the application for hearing on issues concerned with control. Certainly on the face of the application, no control by Mr. Kovlan over WMPO is indicated.

Finally, the public interest requires that the Federal Communications Commission be given an opportunity to waive, on its own motion, Section 1.566 so that the Commission's procedural rules do not arbitrarily deny to a large segment of the population new and improved radio signals. Those persons residing in the WATH proposed gain area are entitled to consideration by the Commission, and such consideration will be denied if the application is not reinstated to the May 11 date.

Wherefore, the premises considered, it is requested that the action of the Broadcast Bureau on May 12, 1967 returning the Radio Athens, Inc. application for increase in power for

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failure to request a waiver of Section 73.35(a) of its Rules be reversed, and that said application be reinstated to the date of original filing, May 11, 1967.

Respectfully submitted,
RADIO ATHENS, INC.

July 12, 1967

DALY & JOYCE
529 Pennsylvania Building
Washington, D. C. 20004
DI-7-0700

/s/ Harry J. Daly

/s/ George R. Borsari, Jr.

Its Attorneys

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OPPOSITION TO PETITION FOR RECONSIDERATION

Comes now Valley Broadcasting, Inc. (herein Valley) permittee of a new standard broadcasting station for Nelsonville, Ohio (BP-17531) and by its attorneys opposes the Petition for Reconsideration, etc. filed by Radio Athens, Inc. (herein WATH). The following is submitted in support thereof.

INTRODUCTION

Valley's application for a new standard broadcast station for Nelsonville, Ohio was filed with the Commission on November 21, 1966. Local notice concerning the filing was given pursuant to the rules (Section 1.580) and the Commission release noting the tendering of the application was issued on November 25, 1966. The application was accepted for filing on January 19, 1967.

On April 5, 1967, a public notice was issued stating that Valley's application, among others, was ready and available for processing and that any application, in order to be considered versus Valley's application, had to be substantially complete and tendered for filing by May 11, 1967.

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The WATH application for increase in power from 1 kw to 5 kw was filed on the last permissable day, viz. May 11, 1967. Section 1.566(a) of the FCC rules provides as follows:

> "Applications which are determined to be patently not in accordance with the Commission's rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver will be considered defective and will not be accepted for filing or if inadvertently accepted for filing will be dismissed. Requests for waiver shall show the nature of the waiver or exception desired and shall set forth the reasons in support thereof." (FCC rules Section 1.566(a); Emphasis supplied)

Since a grant of the WATH application was patently in violation of Section 3.35(a) of the Commission's rules in that there would be prohibited overlap with another commonly owned or controlled station and since no request for waiver or other explanation regarding this matter was provided, the application was not accepted by the Commission, rather was returned to the applicant on June 12, 1967.

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WATH resubmitted its application to the Commission on June 16, 1967, requesting that it be reinstated as of May 10, 1967. This would permit it to be considered vis-a-vis Valley's application -- this being necessary if the applications are in fact mutually exclusive due to a prohibited overlap of their 25 mv/m contours. The request for reinstatement of the WATH application was opposed by Valley who urged that the "cut-off date" had now passed and that as a result, Valley enjoyed a protected position. The Commission granted Valley's

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Construction Permit on July 5, 1967.

ARGUMENT

It is Valley's contention that when the WATH application was determined to be in violation of Section 3.35(a) of the rules and there being no request for waiver or other explanation of the violation, it was in fact defective and the Commission was perfectly correct in returning it to WATH. WATH had almost six months to file its power increase versus the Valley application for Nelsonville and by waiting to the very last day to file, WATH assumed the risk that some defect might preclude its acceptance.

In fact, the application form itself spells out in large type on page 1:

> ". . .DEFECTIVE OR INCOMPLETE APPLICATIONS MAY BE RETURNED WITHOUT CONSIDERATION". (FCC Form 301, Section I, page 1 (Instructions)).

In Ranger v. FCC (294 F.2d 240(1961)), a similar situation was presented to the Court. There the applicant submitted his application on April 20, 1959 offering it for consideration versus another mutually exclusive proposal with a cut-off date of May 15, 1959. Since the application was missing certain required items of information, it was summarily returned by the staff on May 11, 1959. The fact that this caused the application to miss the May 15 cut-off date did not impress the court (Id at 244) which refused to permit the applicant to be consolidated into a hearing and considered for the contested facilities.

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The court in the Ranger case clearly supported the cut-off rules and the Commission's right to return applications which are deficient or violate the rules, even if the returning of the application means that the applicant misses a cut-off date and thereby loses his right to be considered in a hearing for a sought-after facility.

Nor can WATH plead ignorance of the Commission's concern about the 3.35(a) problem since just four years earlier the Commission raised this very same problem of violation of 3.35(a) and common ownership when WMPO, Middleport-Pomeroy, filed for an increase in power to 5 kw. It is submitted that the correspondence back and forth concerning that matter, and indeed the entire incident itself, should have served to alert WATH about the problem and placed upon it the responsibility to insure that the matter was considered in the power increase application. Having failed in this respect, WATH had its application returned as defective.

WATH, in its Petition for Reconsideration, argues that the Commission had no right to return the power increase application because ...

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> "...the fixed rule [viz prohibiting 1 mv/m overlap] did not apply to cases where the 1 mv/m contour of two existing commonly owned standard broadcast stations overlap, as in this case, and one of the stations requests a change in facilities which will increase the existing overlap" (Petition for Reconsideration, etc. at p. 5)

Valley disagrees completely with this interpretation of the rules. Indeed not only was this matter specifically covered in the Report and Order promulgating the new Section

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3.35(a) which contains the fixed standards, but it was also discussed in the Report and Order of the Commission denying reconsideration of the rules change.

> "Application of the rules to proposals for major changes. Respondents contend that a fixed overlap rule should be applied only to applications for new stations. It is asserted that application of the rule to proposals for major changes would act to "freeze" many existing stations at their present facilities since, in some cases, improvement of facilities would increase existing areas of overlap or would create new areas. We are aware of this problem but have concluded, nonetheless, that the new rule should be applied to proposals for major changes. Were we not to do so, applicants could easily frustrate the objectives of the overlap rule by applying

> for stations with intentionally restricted service areas so as not to create prohibited overlap and then, having gotten a grant, applying for a major change which would be exempt from the rule. We recognize, of course, that there will still be a small number of presently existing stations "frozen in" by the rule, but we must conclude, in balance, that effective implementation of our policy restricting new overlap outweighs the problems created in these few cases." (Report and Order re Multiple Ownership Rules 2 RR 2d 1588 at 1601 (1964) (Emphasis supplied))

and in denying reconsideration, the Commission stated:

> "...clearly, overlap resulting from increases in facilities is just the same, and has the same undesirable effects, as overlap from a grant of new stations." (Memorandum Opinion & Order 3 RR 2d 1554 at 1561)

The 1 mv/m contours of WATH and WMPO presently overlap up to a substantial degree and the WATH power increase will increase this overlap. This is conceded in the Petition for Reconsideration (p. 4). This will not simply be substituted or changed overlap, rather will be substantially increased overlap. It is clear under the rules that the new fixed standards prohibiting 1 mv/m overlap apply to this situation and

preclude acceptance of the WATH application.

WATH next argues that the grant of the WMPO power increase application on November 7, 1963, was a recognition by the FCC that WATH Athens, Ohio and WMPO, Middleport-Pomeroy, Ohio, were not under common control or ownership and that the Commission is therefore effectively estopped from concluding that the present WATH application constitutes a violation of Section 3.35(a) of the rules. It is true that the ownership of the two stations -- insofar as we are concerned here -- was the same when the WMPO power increase was granted in 1963 as it is now. What is different, however, is the rules that apply to the situation.

Thus WATH is owned 100% by the Kovlan brothers. A. H. Kovlan owns 70% of the licensee's stock and is its president and a director. R. J. Jones is Secretary of WATH (the ownership files are not clear as to whether he is a director) but he owns no stock interest. A. H. Kovlan owns a 32.5% interest in Radio Mid-Pom, Inc., licensee of station WMPO and serves as Treasurer and Director. R. J. Jones owns 2.5% of the stock of WMPO and is Secretary and a Director. Messers Kovlan and Jones are two out of a total of four directors of Radio Mid-Pom, Inc.

When WMPO filed for its power increase to 5 kw on January 22, 1962, it appeared that there would be a substantial overlap of the service areas of the two operations. Section 73.35(a) of the rules in effect at that time read as follows: A license for a standard broadcast station will not be granted to a party when ...

> "(a) Such party directly or indirectly owns, operates or controls another standard broadcast station, a substantial portion of whose primary service area would receive primary service from the station in question, except upon a showing that public interest, convenience and necessity will be served through such multiple ownership situation" (Pike & Fisher Radio Regs. Current Service Vol, 53:127)

As a result, on April 1, 1963, the Commission corresponded with the applicant requesting information about the matter with particular emphasis on the nature of the overlap area (See letter attached). WMPO responded with a lengthy amendment pointing out that there would be no overlap of the 2 mv/m contours of the two stations (at that time, an important criteria for determining violations of 3.35(a) of the rules); that the two stations served different trade areas; that the programming of the two stations was separate, etc. The Commission granted the application on November 7, 1963.

It is submitted that the WMPO power increase was granted because under the then existing standards a sufficient showing was made that the public interest considerations outweighed the substantial overlap. This grant was not however, as WATH argues, a finding by the Commission that no common ownership or control existed. Indeed the Commission has traditionally prohibited any degree of cross-ownership of stations of the same type serving essentially the same areas. For example, in a situation where an individual was director of a bank which in its capacity as trustee held a majority of stock of

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an AM, FM and TV in a town and he sought to become a director of a competing licensee in the same town, the Commission stated

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as follows:

> The dual and simultaneous service by Mr. Saunders as a director on the Boards of the corporate parents of the two licensee corporations raises a question as to whether it would be in violation of the long-standing policy of the Commission, promulgated under said rules, against permitting any degree of cross-interest, direct or indirect, in two or more stations in the same broadcast service serving substantially the same area. Said policy was adopted by the Commission for the purpose of insuring arms-length competition among such broadcast stations and has been followed over the course of many years in cases similar to that outlined in your letter. While it may be true that, at a given time, no impairment of competition exists in fact, it is the potential of such impairment which the Commission's policy is designed to guard against. (Shenandoah Life Insurance Company 19 RR 1 at 2 (1959).

Subsequent to the WMPO power increase grant, the Commission amended 3.35(a) and changed its "substantial overlap" standard to "1 mv/m overlap" standard. The rule was changed from a vague standard which required ad hoc determinations in each case to a

fixed standard which could be readily applied. Accordingly, when WATH sought its power increase resulting in prohibited overlap of the 1 mv/m contours -- or more accurately, increased prohibited overlap -- the application was now patently in violation of the rules. Since no request for waiver or other explanation accompanied the application, it was subject to immediate return.

To condone or approve WATH's request for reinstatement after passage of the cut-off date, would undermine the entire cut-off procedure. Thus, for example, applicants, whose applications cause prohibited overlap with existing stations and are returned after a cut-off date, could request reinstatement if they could cure the defect by a simple engineering amendment.

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Indeed, anyone who could correct the defect which caused the return of his application could request reinstatement once the defect was corrected.

It is submitted that in filing versus an application on a cut-off list, the burden is on the applicant to be on file timely and to be complete and not in contravention of the rules. If such is not done, then the applicant runs the risk that his application will be returned and that it will not be considered versus another protected application.

> "Some such rule was necessary to meet the problems created by the Ashbacker Doctrine, and this manner of coping with the difficulty lies within the discretion of the Commission, so long as its solution is reasonable." Ranger v. FCC supra at 244

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WHEREFORE, the premises considered, it is respectfully requested that the Commission deny the Petition for Reconsideration filed by WATH.

Respectfully submitted
VALLEY BROADCASTING, INC.

Fisher, Wayland, Duvall
and Southmayd
703 Perpetual Building
Washington, D. C. 20004

/s/ Grover C. Cooper, Its Attorney

July 26, 1967

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April 1, 1963

Radio Mid-Pom, Inc.
Box 71
Middleport, Ohio

Gentlemen:

Reference is made to your application, File No. BP-15,335, for improvement in the facilities of Station WMPO, Middleport-Pomeroy, Ohio.

Examination of your application indicates that parties to the applicant hold interests in the licensee of Station WATH, Athens, Ohio.

Station WMPO with the proposed power increase will serve a portion of the service area of Station WATH which appears to be substantial within the meaning of Section 3.35(a) of the Commission Rules (multiple ownership). On the basis of the information on file, it cannot be determined that the public interest will be served by a grant of the instant application in view of the resultant multiple ownership situation.

Further action on your application will be withheld for a period of thirty (30) days from the date of this letter to give you an opportunity to amend your application to include

any information which, in your view, would tend to establish that a grant of your application would serve the public interest. Any amendment should include an exhibit showing overlap (if any) of the 2.0 mv/m contours and overlap of the 0.5 mv/m contours of the two stations and the service areas of other standard broadcast stations serving the overlap area. The amendment should be filed in triplicate and signed by an officer of the corporation in accordance with the provisions of Section 1.303 of the Commission's Rules. Failure to respond to this letter by April 30, 1963 will render your application subject to dismissal pursuant to Section 1.312(b) of the Commission's Rules.

Very truly yours,

/s/ Ben F. Waple
Acting Secretary

CC: Pete Johnson
Kanawha Hotel Building
Charleston, West Virginia

HMR:vlb/bf:B

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PETITION FOR RECONSIDERATION

Radio Athens, Inc., by and through its attorneys, petitions the Commission to reconsider the grant, without Hearing, of the above referenced application of Valley Broadcasting Inc., and, upon reconsideration, withdraw the grant of the Construction Permit, and designate the application for hearing together with the presently pending application of Radio Athens, Inc. to increase the power of the Station WATH, Athens, Ohio (File No. not yet assigned). In support of this request the following matters are set forth.

Petitioner is a party aggrieved and whose interest will be adversely affected if the grant of the above captioned applicantion is not

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withdrawn. This is so since Petitioner has pending an application before the Federal Communications Commission which is mutually exclusive with the above captioned application of Valley Broadcasting, Inc., and that application was pending before the Commission prior to the "cut-off date" of May 11, 1967 respecting the Valley Broadcasting, Inc. application.

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The referenced Radio Athens, Inc. application was received at the Commission on May 11, 1967 -- the last day for filing a conflicting application with Valley Broadcasting, Inc. Accordingly Radio Athens, Inc. is entitled as a matter of right to a consolidated hearing with the above captioned application of Valley Broadcasting, Inc.

On June 1, 1967, the Commission addressed a letter, No. 8821, to Petitioner requesting additional engineering data. On June 12, 1967, the Commission addressed a letter, No. 8830, to Petitioner alleging violation of Section 73.35(a) of the Commission's Rules, and, at that time returned the application as not acceptable for filing. By letter of June 14, 1967, Petitioner refiled the application with the Commission requesting that it be accepted as of the original filing date. On July 12, 1967 Petitioner filed a formal Petition for Reconsideration, also requesting that the application of Petitioner be accepted as of May 11, 1967, arguing that it should not have been returned by the Commission. Valley Broadcasting, Inc. has filed an Opposition to that Petition for Reconsideration. Petitioner will file a timely Reply. Since the instant Petition for Reconsideration is grounded on the proposition that Radio Athens, Inc. tendered a timely

mutually exclusive application with that of Valley Broadcasting, Inc., the Petition for Reconsideration, the Opposition and the Reply (to be filed) are pertinent to the instant Petition.

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However, there is no necessity to repeat the arguments set forth therein in this Petition for since the arguments have been presented to the Commission in those Pleadings, those Pleadings are hereby incorporated by reference, including the Reply to be filed within the next few days.

There has been filed this date, an engineering amendment to the application of Radio Athens, Inc. establishing that the above referenced application of Radio Athens, Inc. and the above captioned application of Valley Broadcasting, Inc. are mutually exclusive. A duplicate original of that engineering amendment is attached hereto as Exhibit A. This engineering proves what the Commission should have concluded when it first examined the Radio Athens, Inc. application. Even Valley Broadcasting, Inc. concedes that the applications are mutually exclusive. (See paragraph 2 of the attached Exhibit B)

In view of the fact, therefore, that Radio Athens, Inc. filed a timely, mutually exclusive application with that of the above captioned application of Valley Broadcasting, Inc., Radio Athens, Inc. is entitled to a consolidated hearing, and to afford Radio Athens, Inc. that hearing right, it is respectfully submitted that the Commission should withdraw the grant of the above cap-

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tioned application, and, in due course designate for consolidated hearing the Valley Broadcasting, Inc. and Radio Athens, Inc. applications.

Respectfully submitted,
RADIO ATHENS, INC.

/s/ Harry J. Daly

/s/ Leonard S. Joyce

Its Attorneys

DALY & JOYCE
529 Pennsylvania Building
Washington, D. C. 20004

August 4, 1967

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RADIO ATHENS, INC. WATH

* * *

Post Office Box 708, Phone (614) 593-6651 Athens, Ohio

July 27, 1967

Mr. Ben F. Waple, Secretary
Federal Communications Commission
Washington, D. C. 20554

Re: Increase in Power to 5 Kilowatts

Dear Mr. Waple:

Enclosed you will find the application of Radio Athens, Inc. for increase of power as amended by attached Engineering Information.

Also enclosed is the original transmitter log for field test transmitter KLC-320.

Since the Valley Broadcasting, Inc. of Nelsonville, Ohio officials would not grant us permission to make field tests on their site, we made the test approximately 300 feet east of the proposed Nelsonville farthest east tower.

Very truly yours,

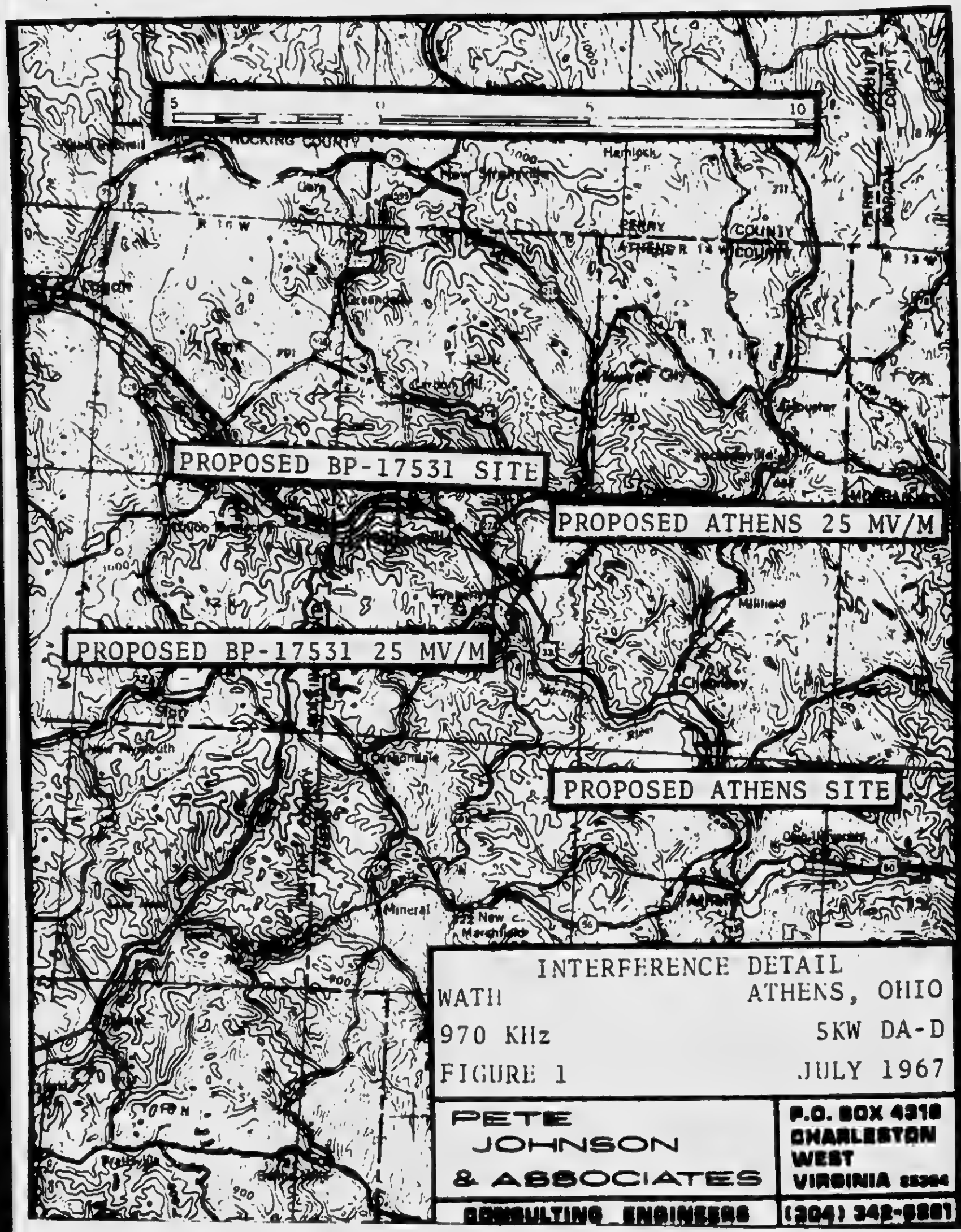
/s/ Andrew H. Kovlan
President

AHK:rae

Subscribed and sworn to before me this 27th day of July, 1967.

/s/ Linda R. Walls, Notary Public

Linda R. Walls, Notary Public
Athens County, Ohio
My Commission Expires July 12, 1971



REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

Radio Athens, Inc. (hereinafter "Athens") by and through its attorneys, in Reply to the "Opposition to Petition for Reconsideration" filed herein on behalf of Valley Broadcasting, Inc. (hereinafter "Valley") sets forth the following.

Predictably, Valley urges the Commission to deny acceptance of the Athens application as of May 11, 1967. Its motives are apparent, i. e., to avoid a consolidated hearing on the mutually exclusive applications of Valley and Athens.[1/]

1/ On August 4, 1967 Athens filed a Petition for Reconsideration of the grant, without hearing, of the Valley application for a new station at Nelsonville, Ohio. The main thrust of the Petition for Reconsideration was that the Valley grant be withdrawn since Athens had on file a mutually exclusive application with Valley necessitating a consolidated hearing on the applications.

Athens and Valley interpret Section 73.35 and 1.566 of the Commission's Rules and Regulations, differently. Each interprets those rules, quite naturally, in a manner most favorable to its case. The Commission, of course, in resolving the present controversy must be guided, solely, by the public interest. It is submitted by Athens that refusal to find that the Athens application was validly tendered for filing May 11, 1967, could not be squared with the public interest, convenience, and necessity.

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The Commission in returning the Athens application on June 12, and Valley in its Opposition, conclude that the application was not acceptable in view of Athens' failure to request a waiver of Section 73.35 of the Commission's Rules and Regulations. It is the position of Athens, first, that such a request was not necessary (regardless of Athens' intent) in view of the language set forth at Note 3 to that rule, and, second, that the fact is that Athens did not intend to go forward at hearing on an issue respecting compliance with Rule 73.35 of the Commission's Rules and Regulations, and, therefore, had no reason to request a waiver of the rule.

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In resubmitting the application on June 14, 1967, Athens made it abundantly clear that it did not intend to fall under the rule, since Mr. Kovlan (and Mr. Jones if necessary) had determined to dispose of all cross-ownership interests between the licensees of Stations WATH and WMPO [See Exhibit A]. Valley responded to that June 14, 1967 letter by letter dated June 20, 1967 [See Exhibit B]. In essence then, both the Commission and Valley would require Athens, in filing its application on May 11, to request a waiver of a rule, which was not applicable to its application. The Commission, in returning the Athens application, assumed without any information before it (and even assuming that Valley's interpretation of Rule 73.35(a) is correct) that Athens desired to, but neglected to, request a waiver of that Rule, when this assumption was but one of two possible reasons for Athens' silence, the other being that it intended to eliminate all cross-ownership between Stations WATH and WMPO. It is respectfully submitted that the Commission had no more reason to believe that Athens

merely forgot to request a waiver than to believe that its failure to request a

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waiver was an excellent indication that Athens had no reason to request a waiver. This being so, the Commission should have written Athens, noting the increased overlap, and should have requested clarification by Athens of its position in the matter. Had it done so, Athens would have indicated that elimination of cross-ownership of the licensees of Stations WATH and WMPO was proposed, and, with this explanation, the Commission would have completed processing the application.

Nor can it be argued that the Commission does not, should not or must not make such inquiries. For example, in this very case, the Commission on June 1, 1967, and before returning the application, wrote Athens requesting the submission of certain additional engineering data [official Notice of Commission's June 1, 1967 letter herein requested]. Why not then, in its June 12 letter did not the Commission request clarification of what to the Commission was an apparent problem respecting Section 73.35(a) of the Commission's Rules and Regulations? In other words, since no waiver of the rule was requested (if indeed one was required regardless of Athens' intentions) should not the Commission have reasonably concluded that the applicant might have an explanation of what he intended to do about the increased overlap be-

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tween Stations WATH and WMPO. Why, in effect, did the Commission conclude that Athens needed a waiver and just forgot to request it?

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In urging that the Commission should have written Athens requesting clarification, Athens is arguing, only, that the Commission should have followed its normal procedures. The Commission has a form letter which it forwards all applicants tendering applications for filing. That form is attached hereto as Exhibit C. The last paragraph indicates clearly that in the event that the Commission desires further data prior to the acceptance of the application, it will notify the applicant and request that additional data.

In Ranger et al v. Federal Communications Commission Fed. 2d 240, 21 Pike & Fischer RR 2030, the case cited by Valley in its Opposition, the Court made clear that the Commission is under an obligation to request additional data from an applicant if the Commission, upon examining the application is unable to conclude whether a grant thereof is in the public interest. In this regard the Court held [Ibid 2032]

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> "We are of the opinion that Section 309(b). . . was intended to apply to what might be termed questions of substance. In other words the Section means that if, with the required information before it, the Commission is unable to make a determination as to whether a grant of the application would serve the public convenience, interest or necessity, it must notify the applicant, receive his reply and if the reply be not satisfactory, designate the application for hearing. We think the Section does not apply where an

> application is lacking in material respects, the applicant having failed to supply the Commission with information obviously necessary to a consideration of its merit in the public interest. Of course there are borderline cases in which the application approaches essential completeness but is lacking in minor respects. In such a case the Commission should give weight to the interest of the applicant and channel the application through the procedure established with that in view; and we understand from its brief here that such is the Commission's policy. . ." [emphasis added]

In this case, there can be no doubt that the Commission should have notified the applicant requesting clarification respecting the increased overlap between

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WATH and WMPO, and upon receipt of applicant's reply it would have been obvious that Athens intended to eliminate all cross-ownership interests between the licensees of those stations. This was not a case of the application lacking material information. Unlike the situation in Ranger, all questions in the application were answered, satisfactorily. It was not a question of any material deficiency in the data supplied in the application.

In its Petition, Athens points to the Commission's prior approval of cross-ownership interests of Mr. Kovlan in the licensees of Stations

WATH and WMPO. Valley responds by arguing that the Rule has been changed and notes, (at page 4 of Valley's Opposition):

> "Nor can WATH plead ignorance [for]. . . just four years earlier the Commission raised this very same problem of violation of 3.35(a) and common ownership when WMPO, Middlepont-Pomeroy filed for an increase in power to 5kw. It is submitted that the correspondence back and forth concerning the matter, and indeed the entire incident itself should have served to alert WATH about the problem and placed upon it the responsibility to insure that the matter was considered in the power increase application." [emphasis added]

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The above-quoted language supports Athens' case in several respects. True, the same cross-ownership existed as before, but before the problem was resolved in favor of Mr. Kovlan. Why then should he now be concerned? Also, before, the Commission corresponded with WATH-WMPO, and if it had done so in this case, it would have discovered that what appeared to be a problem with the Commission was no problem at all. Athens re-asserts that the Commission's prior approval of Mr. Kovlan's cross-ownership in WATH-WMPO is another reason why the Commission should not have returned the application.

Valley's argument that acceptance of Athens' application as of May 11, 1967 would undermine the entire "cut-off" procedure is

without merit. Athens had on file at that time a complete or substantially complete mutually exclusive application with that of Valley. The Commission assumed that there was an overlap of ownership problem, but actually there was not, and, at the very least a hearing in that regard was necessary. Athens is not attempting to cure a fatal defect, nor amend its application, nor change its application. These pleadings are for the purpose of demonstrating that the Commission erred in returning the application in the first instance.

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Finally, Valley does not comment on Athens' request that the Commission, on its own motion, do whatever it deems appropriate to permit a consolidated hearing on the Valley and Athens applications. Those persons residing in the WATH gain area cannot summarily be "written off" consistent with the public interest.

To summarize, failure by Athens to request a waiver of Section 73.35(a) of the Commission's Rules did not justify the return of the application. There already existed overlap between Stations WATH and WMPO, and, pursuant to the provisions of Section 73.35, Note 3, the Commission had to examine that increased overlap before concluding whether such would be consistent with the public interest, convenience and necessity. In fact, it would have been folly for Athens to request a waiver of the Rule since it intended to eliminate all cross-ownership interests between the licensees of Stations WATH and WMPO upon the grant of the construction permit for increased facilities to WATH, and, since this was an obvious possibility as to why a waiver was not requested the Commission should have queried the applicant, pursuant to Section 309(b) of the Communications

Act of 1934, as amended. Again, prior Commission approval of cross-ownership between Stations WATH and WMPO required, at least, a hearing as to whether an increase in overlap, also, would be in the public interest (even assuming no divestiture was proposed). All of the facts of this case considered, the public interest requires that a consolidated hearing on the Athens and Valley applications be ordered.

WHEREFORE, it is respectfully submitted that the Commission reconsider its action of June 12, 1967 in returning the above captioned application, and, upon reconsideration accept the application as of May 11, 1967, and, in due course, designate it for consolidated hearing with the above referenced application in Valley.

Respectfully submitted,
RADIO ATHENS, INC.

/s/ Leonard S. Joyce
Its Attorney
DALY & JOYCE
529 Pennsylvania Building
Washington, D. C. 20004

August 7, 1967

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EXHIBIT A

June 14, 1967

Mr. Ben Waple, Secretary
Federal Communications Commission
Washington, D. C. 20554

Dear Mr. Waple:

I am writing in regard to your letter of June 12, stating that my application is in violation of section 73.25(A). I am aware of this.

I plan to sell all of the 32.5% of stock that I own in Radio Mid-Pom, Inc., License of station WMPO, Middleport, Ohio, as soon as I obtain a construction permit for 5 KW. In fact, just yesterday I met with the other stockholders and discussed the sales terms.

R. J. Jones is secretary of Radio Athens, Inc., but does not own any shares in the station; he is also our attorney and is willing to resign the position of secretary if necessary.

Enclosed you will find an additional check in the amount of $25.00, which was inadvertently short-changed the Commission. (Application for Major Change)

I am hereby sending the application back, requesting it be reinstated to its original date of May 10, 1967.

I hope this meets with your approval.

Very truly yours,

/s/ Andrew H. Kovlan
President

Enclosure
AHK:lrw

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OPPOSITION TO PETITION FOR RECONSIDERATION

Comes now Valley Broadcasting, Inc. (herein Valley) and by its attorneys, opposes the WATH Petition for Reconsideration of the grant of Valley's Construction Permit for a new standard broadcast station at Nelsonville, Ohio (BP-17531). The following is submitted in support thereof.

INTRODUCTION

Valley's application was filed with the Commission on November 21, 1966 and was placed on a "cut-off list" on April 5, 1967. In order to be considered versus the Valley application, other applicants were required to be substantially complete and on file by May 11, 1967.

The WATH application for a move in transmitter site and increase in power from 1 kw to 5 kw was filed on May 11, 1967. However, on June 12, 1967, this application was returned to the applicant. The Commission's letter returning the application informed WATH that the application was in contravention of Section 73.35(a) of the Commission's rules in view of common ownership and prohibited overlap of the

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1 mv/m contours of WATH Athens and WMPO, Middleport, Ohio. Section 1.566(a) of the rules states that applications which are patently not in accordance with the Commission's rules, regulations and requirements . . .

". . .unless accompanied by an appropriate request for waiver, will be considered defective and will not be accepted for filing or if inadvertantly accepted for filing will be dismissed."

The WATH power increase application contained no request for waiver or other explanation of the 73.35(a) violation.

On June 16, 1967 WATH retendered its application, requesting that it be reinstated as of the cut-off date, thus permitting it to be considered versus Valley. Valley opposed this request and on July 5, 1967, Valley's application for Construction Permit was granted. WATH petitioned the Commission to reconsider the returning of its application and this was likewise opposed by Valley. Since most of the arguments in that opposition are germain to the instant Petition for Reconsideration of Valley's Construction Permit grant, they are incorporated herein by reference. In the instant opposition, Valley will comment on some of the other matters raised by WATH's latest Petition for Reconsideration.

ARGUMENT

1. Lack of Standing -- Procedural Questions

It is submitted that WATH does not have standing to Petition for Reconsideration of Valley's Construction Permit

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grant. This lack of standing arises from the fact that WATH did not have a viable application on file as of May 11, the cut-off date -- the last date on which an application could be filed and considered versus Valley.

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The failure of WATH to request a waiver of Section 73.35(a) of the rules and the return of the application as a result thereof, completely divests WATH of a right to be considered versus Valley. In James Gerity, Jr. (9 RR 781 (1953)), the Commission held that a person whose application is not filed until after the grant of a mutually exclusive application is not aggrieved or adversely affected by the grant, hence has no standing to petition for re-hearing. WATH, in attempting to refile after passage of the cut-off date, is in much the same position, if not the identical position. The defective initial filing is tantamount to no filing at all. The refiling comes after the cut-off date, hence, WATH has no legal standing to claim aggrievement from the grant of Valley's application.

The Petition for Reconsideration is also procedurally deficient in that, without a proper showing, it relies on new facts which were not previously submitted to the Commission. Section 1.106(c) of the rule states that a Petition for Reconsideration which relies on facts not previously submitted will be granted only where . . .

1. The facts have changed;

2. The facts were unknown and could not have been discovered through ordinary diligence;

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3. The public interest requires consideration of the facts.

It is submitted that the effort to introduce measurements for the first time via the Petition for Reconsideration, is an effort to rely on new facts without the required showing and should not be entertained by the

Commission. Thus, there is no showing whatever that the facts have changed or that they could not have been discovered through ordinary diligence. Nor are the new facts of a nature -- such as those involving misrepresentation or bad character -- where public interest consideration demand that they be considered irrespective of procedural matters.

WATH takes the position that the measurements prove something that the Commission itself should have been able to ascertain from a review of its application.

> "This engineering proves what the Commission should have concluded when it first examined the Radio Athens, Inc. application." (Petition for Reconsideration, at p. 3)

The fact is, however, that the application as filed contained no measurements establishing a 25 mv/m overlap between the WATH proposal and the Valley application; nor was there mention of such overlap in the WATH application or in the letter of transmittal. In fact, instead of depicting its entire 25 mv/m contour as required by the form (FCC Form 301 Section V-A, Page 2, Paragraph 12-A), --- and hopefully showing on the same map the alleged overlap and mutual exclusivity with

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the long-pending Nelsonville application --- WATH merely depicted a portion of its own 25 mv/m contour. This was the portion of the 25 mv/m contour away from the direction of Nelsonville. (See figure 2, attached hereto taken from the WATH application.) The Commission can hardly be blamed for not immediately recognizing the 25

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mv/m overlap between WATH and Valley's proposal considering that WATH chose to keep the matter so quiet.

It is submitted that by failing to establish its mutual exclusivity with Valley and by tendering an application which violated Section 73.35(a) of the Commission's rules -- with the resultant return of the application -- WATH lost the right to be considered versus Valley's application and thereby is not a party legally aggrieved and has no legal standing to petition to reconsider the Valley grant.

2. Other Arguments by WATH

In its Petition for Reconsideration of Valley's Construction Permit grant, WATH incorporates by reference all arguments made by it requesting reconsideration of the return of its application -- including its reply. Valley, likewise, incorporates by reference its opposition to the earlier filed Petition for Reconsideration. In addition, Valley will comment herein briefly on matters raised in WATH's reply filed on August 7 which matters are part of the

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instant Petition for Reconsideration of Valley's Construction Permit grant.

Thus, WATH argues that it was not required to request waiver of Section 73.35(a) of the rules because of Note 3 thereto. A careful reading, however, clearly establishes that Note 3 has no relevance to the instant proceeding. That Note states that the 1 mv/m overlap prohibition applies to ". . . all applications for major changes in existing stations. . .". This same point was made in the text of the order adopting the new 73.35(a) provisions and in the order denying reconsideration

of the new rules (See 2 RR2d 1588 at 1601 (1964) and 33 RR2d 1554 at 1561 (1964)).

The portion of Note 3 which WATH appears to rely on as giving it a right to be heard on public interest questions deals with situations where an application for a major change results in overlap no greater than the overlap already existing -- which overlap may be in new areas. Under such circumstances, the Commission can grant the major change. The Note contains the admonition, however, that the Commission will not make such a grant if the population in the new area substantially exceeds the population in the old overlap area -- unless the public interest so requires. This reference to public interest questions is presumably what WATH feels entitles it to a hearing.

None of this, however, has any relevancy to the instant case since the WATH application for power increase from 1 kw to 5 kw promises severely increased overlap of the

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WATH and WMPO 1 mv/m contours. This is not simply a changed overlap area situation, rather is a substantially increased overlap situation clearly prohibited by Section 73.35(a) of the rules and subjecting the application to immediate return as defective (FCC Rules, Section 1.566).

WATH next argues that the Commission could not properly return its application without first making inquiry as to the rule violation. Ranger v. FCC (294 F.2d 240 (1961)) is cited as support for this proposition. It must be remembered, however, that the applications

being considered in the Ranger case were filed prior to the 1960 amendments to the Communications Act. Section 309(b) of the Communications Act in effect at that time required formal notice to an applicant if the Commission could not make a grant. These notices were called McFarland letters. It is this old provision which the court was referring to in the language cited by WATH. Indeed, at footnote 2 of the Ranger decision, the old Section 309(b) of the Communications Act is quoted.

On September 13, 1960 the Communications Act was amended with the McFarland letter provision specifically being deleted. Now the Commission need not send notices relative to deficiencies in applications, rather, can simply designate them for hearing or, in the case of a defective application, can merely return such an application to the applicant.[1/] The fact that the Commission may, from time

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1/ Indeed, according to the Ranger holding, even under the old 309(b) patently defective (i. e. "lacking in material respects") applications could be returned without prior notice.

to time, inquire about minor deficiencies in an application does not prohibit it from summarily returning an application such as WATH's which on its face is clearly in violation of FCC rules.

WATH finally argues that since the Commission corresponded with station WMPO relative to a possible violation of 73.35(a) of the rules when it filed its power increase application in 1962, it should likewise have corresponded with WATH prior to returning its

application for power increase. The fallacy here, however, is that Section 73.35(a) of the rules was amended between the WMPO and the WATH filings. Thus when the WMPO application was filed, there was no specifically prohibited overlap contours (by rule) for commonly owned or controlled stations. The rule prohibited such stations from providing primary service to substantially the same areas except upon a showing that the public interest required such service. (See Pike & Fischer Radio Regs., Current Service Vol. 53:127 for old 73.35(a)). This automatically required a letter from the Commission and gave the applicant an opportunity to make the required showing.

Subsequent to the WMPO power increase filing, Section 73.35(a) of the rules was amended to bar overlap of the 1 mv/m contours of commonly owned or controlled stations (See 2 RR 2d 1588 (1964)). It was this new rule which was in effect when WATH filed its power increase application -- and under this new rule, the application was defective. It is

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submitted that the Commission was correct in returning it to the applicant. WATH now attempts to saddle the Commission with the responsibility for failing to carefully assess the consequencies of the return of this application, i. e. resulting in WATH not being on file on the cut-off date so as to be considered versus Valley's application. The fact is, however, that WATH did not even inform the Commission of its alleged mutual exclusivity with Valley -- in fact obscured the matter by only depicting a portion of its 25 mv/m contour. The result was simply the routine return of a defective application under Section 1.566 of the rules. It is submitted that the responsibility for

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failing to have its application complete and on file timely lies with the applicant himself and the consequences of failing to meet this responsibility should likewise be with the applicant.

Wherefore, the premises considered, it is respectfully requested that the Commission deny the WATH Petition for Reconsideration of the grant of Valley Broadcasting, Inc.'s Construction Permit for a new standard broadcast station at Nelsonville, Ohio.

Fisher, Wayland, Duvall
and Southmayd
703 Perpetual Building
Washington, D. C. 20004

Respectfully submitted,
VALLEY BROADCASTING, INC.

/s/ Grover C. Cooper, Its Attorney

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REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

Radio Athens, Inc., (Athens) by and through its attorneys, in Reply to Valley Broadcasting, Inc.'s (Valley) "Opposition to Petition for Reconsideration" sets forth the following.

In its Opposition, Valley alleges that Athens lacks standing to file its Petition for Reconsideration; that the Petition for Reconsideration relies upon new facts without sufficient showing that such should be entertained by the Commission; addresses itself to matters incorporated by reference in the Petition for Reconsideration, respecting Athens' pleadings urging that the Commission reconsider and accept for filing its application to increase power of Station WATH, Athens, Ohio, which was returned by the Commission on June 12, 1967; and asserts that the Commission was under no obligation to address a letter of inquiry to Athens prior to returning its application, referred to above, as not acceptable for filing.

Standing

As set forth in its Petition for Reconsideration, Petitioner does have standing to file a Petition for Reconsideration of the grant of Valley's above-captioned application, since it has pending a timely application before the Federal Communications Commission which is mutually exclusive with Valley's application.

Valley's argument that Athens does not have standing, assumes that Petitioner's application was not on file by Valley's cut-off date. It is Petitioner's position that this assumption is in error.

Valley, in support of its allegation of lack of standing cites James Gerity, Jr., 9 Pike & Fischer RR 781. That case is not in point. In Gerity the Commission concluded that an applicant who had filed an application four days after the grant of an application with which it would have been mutually exclusive was not a party aggrieved or adversely affected. Here however, the Valley application was not granted until July 5, 1967, almost a month after the Athens application was filed. Moreover in Gerity, the petitioner did not even claim standing and requested the Commission to afford relief on its own motion.

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The Question of Measurements

Valley argues that the measurement data submitted should not be entertained by the Commission since it constitutes new facts which could have been discovered, previously, with ordinary diligence,

and that Athens has not made a sufficient showing that the public interest requires consideration of those measurements.

Valley argues that the Commission had no way of knowing that the application of Athens and Valley were mutually exclusive when it returned Athens' application. Athens does not concede this, and in fact reaffirms its contention set forth in its Petition for Reconsideration that the Commission, having in its possession the contours and measurement data of stations and proposals in the area should have concluded the mutual exclusivity. Be that as it may, such is irrelevant to this proceeding. The question here is whether or not the Commission knew of the mutual exclusivity when it granted the Valley application. As stated, supra, the Valley application was granted July 5, 1967. Fifteen days prior thereto, Valley, itself, admitted to the Commission that the Athens and Valley applications were mutually exclusive. [See Exhibit B to Athens' Petition for Reconsideration, herein]. Accordingly, in supplying the measurement data in its Petition for Reconsideration, the Petitioner is not

supplying facts that were not known to the Commission at the time that it granted the Valley application. Valley conceded mutual exclusivity, which it determined by a "preliminary review". It must be assumed that the Commission considered Valley's June 20, 1967 letter when it granted the Valley application, and, it must be assumed further that if Valley reached the conclusion that the applications of Athens and Valley were mutually exclusive, based only upon a "preliminary review", the Commission would have reached that same conclusion, considering its extensive engineering records, including

contours of existing and proposed stations in the area, measurement data of the area gained over the years, etc. Rather than new facts, therefore, the measurement data submitted in Athens' Petition for Reconsideration, constitutes, only, formal proof of that which was known to Valley, Athens and the Commission prior to the grant of Valley's application.

Valley's Arguments Respecting Related Pleadings

In its Petition for Reconsideration, herein, Athens incorporated by reference its Petition for Reconsideration, Valley's Opposition, and Petitioner's Reply in the proceeding involving the return of the application of Athens.

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In its Opposition herein, Valley addresses itself to certain of those matters incorporated by reference, and is silent respecting others. It repeats its arguments that the Commission correctly returned Athens' application as inconsistent with Section 73.35(a) of the Commission's Rules and Regulations, and that the Commission's previous grant to station WMPO is irrelevant to this proceeding. Petitioner has answered those contentions in its Pleadings so incorporated and will not repeat those arguments here. Interestingly, Valley ignores two vital arguments set forth by Athens, in its Reply so incorporated, first that there was no reason to request a waiver of any Rule when Athens filed its timely application with the Commission, in view of Athens' intent to divest itself of all cross-ownership between Stations WATH and WMPO prior to commencement of the proposed operation of Station WATH, and second, that the public interest must be

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considered in resolving the fate of the Athens and Valley applications. Nowhere in any of the pleadings filed by Valley, to date, has it advanced any arguments to the effect that the public would be better served if Valley's grant is left undisturbed and if Athens' application is not accepted as of May 11, 1967. If this were to come to pass, the Commission would not have an opportunity to choose between the proposals of Athens and Valley to determine which proposal would better serve the public

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interest, convenience and necessity. Such a result just cannot be squared with the public interest, for in effect, the Commission would be "writing-off," summarily, the additional service of the public residing within the gain area proposed by Athens.

Finally, Valley's attempt to distinction between Section 309 of the Communications Act of 1934, as amended, before and after the 1960 amendments is unpersuasive. It is not Athens' position that the Commission was obliged to issue Athens a MacFarland letter. It was and is Athens' position, that the Commission, in following its normal procedures, should have addressed a letter to Athens, as it has done in many cases (and indeed as it did here regarding the engineering data filed with Athens' application) respecting the overlap between WATH and WMPO in order to determine whether, in fact, any problems existed. Had it done so it would have discovered that there was no problem since Athens intended to divest itself of all cross-ownership interests between Stations WATH and WMPO, upon a grant of the WATH proposal.

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WHEREFORE, in view of the foregoing, and Petitioner's Petition for Reconsideration, herein, is respectfully submitted that the Commission reconsider its grant of Valley Broadcasting, Inc. application, and, upon reconsideration, withdraw the grant,

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and designate for consolidated hearing the applications of Radio Athens, Inc. and Valley Broadcasting, Inc., in order to determine which proposal will better serve the public interest, convenience and necessity.

Respectfully submitted,
RADIO ATHENS, INC.

/s/ Harry J. Daly

/s/ Leonard S. Joyce

Its Attorneys
DALY & JOYCE
529 Pennsylvania Building
Washington, D. C. 20004

August 25, 1967

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MEMORANDUM OPINION AND ORDER

Adopted: October 31, 1967 Released: November 1, 1967

By the Commission: Commissioners Hyde, Chairman; Bartley and Johnson absent.

1. The Commission has before it the above-captioned and described applications and two petitions filed by Radio Athens, Inc. (WATH).

The first petition requests reconsideration of an action of June 12, 1967, by the staff pursuant to delegated authority under Section 0.281(n) of the Commission's Rules in returning as unacceptable WATH's application for increase in power. The second petition requests reconsideration of the Commission's action of July 5, 1967, in granting without hearing the application of Valley Broadcasting, Inc. (WNAL). WATH also requests that the permit granted to WNAL be withdrawn and that the two applications be designated for hearing. WNAL filed oppositions to both petitions, and WATH replied to both oppositions.

2. A background statement will be useful in placing the contentions of WATH in perspective. Valley Broadcasting, Inc., tendered its application on November 21, 1966. Subsequently it was found to be acceptable, and on April 5, 1967, the Commission issued a public notice announcing that a number of applications, including the application of Valley Broadcasting, Inc., would be available for processing on May 12, 1967 and that conflicting applications must be on file by the close of business on May 11, 1967. The WATH application was tendered on May 11, 1967. By letter dated June 1, 1967, WATH was advised that a preliminary analysis by computer indicated that the proposed antenna parameters would not produce values of radiation indicated on the horizontal plane radiation pattern. WATH was advised that an amendment to correct the discrepancy should be filed. By letter of June 12, 1967, the WATH application was returned because of noncompliance with Section 73.35(a) of the Commission's Rules inasmuch as the increase in power of WATH would increase the existing overlap of the WATH one mv/m contour with that of

Station WMPO, Middleport-Pomeroy, Ohio, there being substantial cross-ownership between the two stations. WATH retendered the application on June 16, 1967. Accompanying the application was a letter dated June 14, 1967, and signed by Andrew H. Kovlan[1/] in which the Commission was told, for the first time, that Mr. Kovlan planned to sell his WMPO stock as soon as a construction permit to increase the power of WATH is granted. Mr. Kovlan's letter also stated that R. J. Jones, minority stockholder of WMPO and secretary of WATH, would resign his office with WATH, and requested that the application be "reinstated" as of May 10, 1967. This request was opposed by Valley Broadcasting by letter of June 20, 1967, in which, for the first time, there was a suggestion that the WATH application was mutually exclusive with Valley Broadcasting's application. No data was submitted at that time to support this claim, and it was not established that the WATH application, if acceptable, would be mutually exclusive with the Valley Broadcasting application until WATH filed measurement data simultaneously with the filing of the petition for reconsideration of the grant of the Valley Broadcasting application.

3. WATH claims that its application should not have been returned, but should have been accepted and designated for hearing with the Nelsonville application. We consider the various arguments in support of this claim seriatim.

4. WATH correctly assumes that its application was returned pursuant to the provisions of Section 1.566 of the Commission's Rules[2/] in view of the increase in overlap of the one mv/m contours of WATH and WMPO. WATH asserts that the action in returning its

application rested on a misinterpretation of Sections 1.566 and 73.35(a) and that neither section is applicable to its application. WATH cites language in the Commission's order[3/] amending Section 1.566:

> "It is applicable only to applications which, because of the nature of the particular rule involved, can be patently seen to be in conflict with the rule. . . . Where the conflict can be determined only after a hearing evaluating various pertinent factors, this procedural provision is inapplicable."

For the reasons noted hereinafter, information on file with the Commission indicated a clear violation of Section 73.35(a), and, therefore, the application was returned.

5. WATH next claims that Section 73.35(a) does not apply to its application. WATH asserts that the fixed rule prohibiting overlap of one mv/m contours does not apply to cases where the one mv/m contours of two existing, commonly owned standard broadcast stations overlap and one of the stations requests a change in facilities that will increase the existing

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[1/] Mr. Kovlan is president, director and seventy-percent stockholder of WATH and treasurer, director and holder of 32.5 percent of the stock of WMPO.

[2/] Pertinent provisions of Section 1.566 are as follows: "(a) Applications which are determined to be patently not in accordance with the Commission's rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will be considered defective and will not be acceptable for filing or if inadvertently accepted for filing will be dismissed. . . ."

[3/] 18 FR 7194 (1953).

overlap. Under such circumstances, WATH contends, the Commission has stated that it". . . will not grant the application if it finds that to do so would be against the public interest, convenience, and necessity."

6. The quoted language is taken out of context from Note 3 following Section 73.35 of the rules, and clearly refers to a situation unlike that involving WATH. Note 3, after clearly making the overlap provisions of Section 73.35(a) of the rules applicable to major changes[4/] provided a specific exception in the case of a major change resulting in overlap no greater than that already existing. The note further states parenthetically that the resulting overlap areas in such a major change may consist partly or entirely of new terrain. However, the note continues, if the population in the resulting overlap areas substantially exceeds that in the previously existing overlap areas, the Commission will not grant the application if it finds that to do so would be against the public interest, convenience, and necessity. In context, the quoted language is clearly limited only to those situations in which the overlap is reduced in some areas and increased in others. It was not intended to refer, and clearly does not refer, to situations where there is a substantial overall increase in one mv/m overlap as is the case with WATH and WMPO.

7. WATH contends that nowhere in Section 73.35(a) of the Rules or the orders adopting the present provisions does the Commission suggest that in cases where there will be an increase in the overlap of one mv/m contours the increase will be patently against the rules. But this contention is untenable in the face of the Commission's clear and specific statements concerning the applicability of the rule. First, the note to Section 73.35 specifically states that paragraph (a) of the section prohibiting overlap of one mv/m contours

of commonly owned stations is applicable to major changes. Moreover, in adopting the new standard, the Commission made it abundantly clear that the standard applied to major changes. Amendment of . . . the Commission's Rules relating to Multiple Ownership . . ., 2 RR 2d 1588, 1601 (1964). The applicability of the standard was affirmed in disposing of petitions urging relaxation of the standard, 3 RR 2d 1554 (1964).

8. WATH next contends that the provisions of Section 73.35(a) do not apply to its application alleging that, in connection with a power increase of Station WMPO authorized by the Commission on November 7, 1963, the Commission made a determination that Andrew H. Kovlan does not have a sufficient interest in WMPO to come within the purview of Section 73.35(a). The facts concerning the WMPO matter are as follows: During the pendency of the application for a WMPO power increase, the Commission, by letter of April 1, 1963, noted the cross-ownership between WMPO and WATH and advised WMPO that action on the application would be withheld to afford the applicant an opportunity to amend the application to include any information which would tend to establish that a grant of the application would be in the public interest. Specifically, the Commission requested WMPO to furnish an exhibit showing overlap of the 2.0 mv/m contours, if any, the overlap of the 0.5 mv/m contours and the service areas of other stations providing service to the area. In response to the letter WMPO filed an amendment signed by WMPO's president, John E. M. Kerr, stating, among other things that Mr. Kovlan can control the operation of WATH

4/ The WATH proposal is a major change by definition. See Section 1.571(a)(1) of the Rules.

but that, since he holds less than a majority of the WMPO stock, he cannot control the operation of WMPO. An exhibit filed in response to the Commission's request showed that the 2.0 mv/m contours of the station would be tangent (i.e., they would not overlap) and that there would be an increase in the area served by the 0.5 mv/m contours of both stations.

9. The WMPO application was granted by the Commission, as indicated by WATH, without comment. The basis for the Commission's action was not, however, an acceptance of the assertion that Mr. Kovlan cannot control WMPO but was a determination, on the basis of WMPO's exhibit, that, although some increase in overlap of 0.5 mv/m contours would occur, it was not sufficient under the provisions of Section 73.35(a) then in effect to bar a grant of the power increase. With respect to the allegation that Mr. Kovlan cannot control WMPO, this assertion is not in accord with the facts. Certainly Mr. Kovlan's interest in the ownership of WMPO is substantial, and no other single stockholder has a greater interest. As an officer and director and a substantial stockholder, he clearly is in a position to have a considerable influence in the operation and control of the station.[5/]

10. In answer to Valley Broadcasting's statement, first made in its letter of June 20, 1967, opposing WATH's request that its application be "reinstated", that the WATH proposal did not comply with the provisions of Section 73.35(a) of the Rules and that WATH did not request a waiver as required by Section 1.566(a) of the Rules, WATH asserts that the Commission should have assumed that WATH either intended to request a waiver and neglected to do so or that WATH

intended to eliminate the cross-ownership between WATH and WMPO. With this argument, WATH seems to be saying that conjecture is a proper basis for Commission actions. Clearly, conjecture is not a valid basis for any agency action.

11. The Commission did not resort to conjecture, but properly based its determination on the material before it. All that is shown in the application itself with respect to legal qualifications including other broadcast interest is a brief statement on page 1 of Section II of FCC Form 301 to the following effect: "All of this section is on file with the exception of Page 6 which is not applicable." Reference to the ownership files of WATH and WMPO discloses that Mr. A. H. Kovlan is an officer, director and stockholder of both corporate licenses. An examination of the existing and proposed contours of WATH and the existing contours of WMPO revealed that the existing one mv/m contours overlap and that an increase in the power of WATH would increase the overlap of the one mv/m contours in contravention of Section 73.35(a) of the rules. Manifestly, the application when tendered was not in accordance with the Commission's rules (Section 73.35(a)). Mr. Kovlan belatedly advised the Commission that he planned to dispose of his interest in WMPO, but this advice comes too late. There was not the slightest suggestion that any change in ownership of WMPO was contemplated when the application was tendered. The burden is upon the applicant to make clear its intention with respect to pertinent factors in timely fashion. This WATH did not do. If the intention had been otherwise, the burden is similarly upon the applicant to request a waiver of any provision bringing the proposal into conflict with the rules in order to avoid the rejecting of the application pursuant to Section 1.566(a) of the

Rules. The conflict at the time the WATH application was tendered was obvious, and there was no necessity for a hearing contemplated by Section 1.566(a).

5/ Letter to William F. Huffman Radio Inc., August 2, 1967, FCC 67-918; Dover Broadcasting Co., Inc., 5 RR 2d 440.

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12. WATH contends that the Commission should have requested clarification of the duopoly question and refers to the Commission's letter of June 1, 1967, advising WATH of the error in proposed antenna parameters. The clear conflict with Section 73.35(a) of the Rules is not in the same category with an error in computation. As a consistent practice, the first study made in connection with applications proposing new or modified directional antenna systems is an analysis by computer to determine whether the parameters depict the proposed radiation pattern. In the Commission's experience, errors in this area are common, and the Commission consistently requests the correction of such errors before it determines whether an application is acceptable from an engineering standpoint. Where, as here, there is an obvious conflict with a rule, in the absence of a waiver request, there is no apparent burden on the Commission to seek clarification. Cf. Natick Broadcast Associates, Inc., 6 FCC 2d 607, 9 RR 260 (1967).

13. WATH claims that refusal to accept the application as of May 11, 1967, will constitute a denial of the application without hearing in violation of Section 309 of the Communications Act of 1934, as amended. This contention is ill-founded because on the date the

application was tendered it was defective under the provisions of Section 1.566(a) of the Rules. On the date when an effort was made to cure the defect by offering to eliminate the cross-ownership between WATH and WMPO, it was untimely. Clearly, defective or untimely applications are not entitled to a hearing in proceedings with other applications with which they would be mutually exclusive. Ranger et al. v. Federal Communications Commission, 111 U.S. App. D. C. 44, 294 F.2d 240, 21 RR 2030 (1961); Virginia Broadcasters, 9 FCC 2d 205 (1967).

14. Finally, WATH alleges that the public interest requires that the Commission be given an opportunity to waive Section 1.566 on its own motion so that the procedural rules do not deny to a large segment of the population new and improved radio signals. This argument could be made by countless potential applicants (Virginia Broadcasters, supra), and a departure from established cutoff and consolidation procedures would leave such procedures in shambles. As we have observed on a previous occasion:

> "[P]ublic interest considerations can hardly be said to weigh in favor of the procedural disarray that would result from acceptance of the proposition that evidence which is untimely filed without good cause should be considered after a matter is closed." Natick Broadcast Associates, Inc., 6 FCC 2d 607, 609; 9 RR 2d 360, 363 1967).

15. To summarize, WATH tendered its application on the last day on which, pursuant to Sections 1.571(c), 1.227(b)(1) and (4), and 1.591(b) of the Rules, the WATH application could be accepted for filing. On that date it was defective because of a clear conflict with

Section 73.35(a) of the Rules. Consequently, the application was returned pursuant to Section 1.566(a) of the Rules. Subsequently, when an effort was made to cure the defect, the application was untimely and therefore not acceptable. Under these circum-

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stances WATH's requests for reconsideration must be denied and its application again returned. 6/

Accordingly, IT IS ORDERED, That the petitions of Radio Athens, Inc., ARE HEREBY DENIED and that the application of Radio Athens, Inc., BE RETURNED.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Ben F. Waple
Secretary

cc: Daly & Joyce
Radio Athens, Inc.
Valley Broadcasting, Inc.
Grover Cooper, Esq.

6/ In connection with this matter there is a dispute between Valley Broadcasting and WATH over whether WATH may introduce new matter in a petition for reconsideration by submitted measurement data. In the present instance, we find that the data submitted merely serve to confirm previous unsupported contentions by both parties that the Valley Broadcasting and WATH applications are mutually exclusive.

"Text of former Section 73.35(a) of the Commission's Rules (included in this Joint Appendix at the request of Intervenor)".

> "(a) Such party directly or indirectly owns, operates or controls another standard broadcast station, a substantial portion of whose primary service area would receive primary service from the station in question, except upon a showing that public interest, convenience and necessity will be served through such multiple ownership situation; or".

BRIEF FOR APPELLANT

In the
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 21,476

RADIO ATHENS, INC. (WATH),

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

VALLEY BROADCASTING, INC.,

Intervenor.

APPEAL FROM MEMORANDUM OPINION AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

LAUREN A. COLBY
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Washington, D.C. 20005

Attorney for Appellant

QUESTIONS PRESENTED

1. Whether the Commission erred in returning the WATH application without a hearing as not acceptable for filing for violation of the duopoly rule (Section 73.35(a) of the Commission's Rules).

2. Whether the Commission erred in again rejecting the application upon retender on the gounds that the information filed was after the "cut-off" date.

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No. 21,476

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Intervenor.

APPEAL FROM MEMORANDUM OPINION AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This appeal is taken by Radio Athens, Inc. (WATH) (hereinafter referred to as "Appellant"), pursuant to Section 402(b)(6) of the Communications Act of 1934, as amended (47 U.S.C. 402(b)(6)), Section 10 of the Adminstrative Procedure Act (5 U.S.C. 1009), and Rule 37 of this Court, from a Memorandum Opinion and Order of the Federal Communications Commission (hereinafter referred

to as "Commission"), released November 1, 1967, denying Petitions for Reconsideration filed by Appellant against the following actions of the Commission: (a) the action of June 12, 1967, dismissing Radio Athens' application for a construction permit for an increase in daytime power of Standard Broadcast Station WATH, Athens, Ohio; and (b) the action of July 5, 1967, granting without hearing the application of Valley Broadcasting, Inc., for a construction permit for a new standard broadcast station at Nelsonville, Ohio.

STATEMENT OF THE CASE

Appellant, Radio Athens, Inc., is the owner, operator and licensee of Standard Broadcast Station WATH, Athens, Ohio. Radio Athens, Inc., is a corporation, the officers, directors and stockholders of which are as follows:

A.H. Kovlan	Pres., Director	140 shares	(70%)
Steven H. Kovlan	Vice-Pres., Director	40 shares	(20%)
Edward Kovlan	Director	20 shares	(10%)
W.D. Kelton	Treasurer	No stock	
R.J. Jones	Secretary	No stock	(R.1-4)

Approximately 20 miles south of Athens, there are located the communities of Middleport and Pomeroy, Ohio. These two communities are served by Standard Broadcast Station WMPO, which is licensed to Middleport-Pomeroy, and is owned and operated by

by Radio Mid-Pom, Inc. The officers, directors and stockholders of Radio Mid-Pom, Inc., are as follows:

John Kerr	Pres., Director	65 shares	(32.5%)
Frank K. Rauch	Vice-Pres., Director	65 shares	(32.5%)
A.H. Kovlan	Treasurer, Director	65 shares	(32.5%)
R.J. Jones	Secretary, Director	5 shares	(2.5%) (R.5-8)

Thus, it is apparent that A.H. Kovlan and his brothers, Steven and Edward, control Radio Station WATH. However, Mr. Kovlan has less than a third interest in Station WMPO, the remainder of the stock being owned by persons totally unconnected with the Kovlan family.

The respondent Commission has certain Rules, known as "cut-off rules" providing deadlines for the filing of applications for construction permits for new standard broadcast stations which are mutually exclusive with other such applications. On April 5, 1967, the Commission issued a public notice announcing that the application of Valley Broadcasting, Inc., for a construction permit for a new standard broadcast station at Nelsonville, Ohio, would be available for processing on May 12, 1967, and that conflicting applications must be on file by the close of business on May 11, 1967. (R. 23-29).

On May 11, 1967, Appellant timely filed an application for an increase in the operating power of Station WATH, Athens, Ohio, from 1 kw to 5 kw (R. 30-172). The application involved a "prohibited overlap" with the application of Valley Broadcasting, Inc. Accordingly, both applications could not be granted and they were "mutually exclusive".

On June 1, 1967, the Commission directed a letter to the Appellant, requesting certain engineering information (R. 181). Thereafter, however, on June 12, 1967, the Commission suddenly and arbitrarily returned Appellant's application to Appellant, together with a letter advising the Appellant that the application was not acceptable because it increased the area served in common by Stations WMPO and WATH, thereby allegedly violating Section 73.35(a) of the Commission's Rules and Regulations, prohibiting "duopoly" (the control by one person or group of two standard broadcast stations serving the same area) (R. 182). Thereafter, on July 5, 1967, the Commission granted without hearing the competing application of Valley Broadcasting, Inc. (R.268).

Appellant filed timely Petitions for Reconsideration, requesting the Commission to reconsider and set aside its actions returning Appellant's application and granting the Valley Broadcasting application (R. 189-199 and 213-234). In said Petitions, Appellant showed, among other things, that its application did not violate the "duopoly" rule because Stations WMPO and WATH are not under common control and, moreover, that in order to avoid any question whatsoever of compliance with the Rule, it was the intention of Mr. Kovlan to divest himself

of his minority interest in Station WMPO prior to going on the air with increased power at Station WATH[1/] (R. 189-199 and 213-234). Nonetheless, on November 1, 1967, the Commission released a Memorandum Opinion and Order, refusing again to accept Appellant's power increase application, and denying Appellant's Petitions for Reconsideration in their entirety (R.269-274). Appellant hereby appeals from said Memorandum Opinion and Order.

STATUTES AND REGULATIONS INVOLVED

The relevant portions of the Communications Act of 1934, as amended, and the Commission's Rules and Regulations, are set forth in Appendix A, infra.

STATEMENT OF POINTS

1. Where an individual owned a majority interest in radio station A and a minority interest in station B, and where an application was filed for an increase in power of station A, which would increase the area served in common by the two stations, the Commission erred in determining without a hearing that the application violated the Commission's Rule (Section 73.35(a) of

---

1/Still further, it was shown that R.J. Jones would resign as Secretary of Radio Athens, so that there would be absolutely no cross-ownership or common officers or directors, between the two corporations.

the Commission's Rules, known as the "duopoly rule"), prohibiting common control by one individual or group of two stations serving the same area.

2. Where the above-described power increase application was timely filed by a "cut off date" or deadline for comparative consideration with another application for a new station in Nelsonville, Ohio, and where the application for the power increase and the new station were mutually exclusive, and where Appellant resubmitted the power increase application with a specific showing that all cross ownership between stations A and B would be removed so that there could be no possible question of violation of the "duopoly rule", the Commission erred in again dismissing without hearing the application for the power increase, and in granting without hearing the application for the new station.

SUMMARY OF ARGUMENT

The Commission's action, determining without a hearing that Appellant's application violated the duopoly rule, was arbitrary, capricious and unreasonable. In the first place, the application didn't violate the rule. Secondly, the question of whether the

application violated the rule was a question of fact, specifically required by statute to be determined only after a proper hearing. Third, even assuming, solely arguendo, that the application could be found to violate the rule (which it most assuredly could not), it was arbitrary and capricious for the Commission to dismiss the application without even giving Appellant any notice or opportunity to show that the application was not in violation.

ARGUMENT

I

Appellant's Application Never Violated the "Duopoly Rule"

The most remarkable aspect of this case is that it involves the dismissal of Appellant's application by the Federal Communications Commission for alleged violation of a rule which the Appellant never, in fact, actually violated! That rule, which is Section 73.35(a) of the Rules and is known as the "duopoly rule", provides that "no license for a standard broadcast station shall be granted to any party (including all parties under common control) if...(a) such party directly or indirectly owns, operates or controls one or more standard broadcast stations and the grant of such license will result in any overlap of the predicted or measured 1 mv/m groundwave contours of the existing and proposed stations...".

Here, Mr. A.H. Kovlan controlled Radio Station WATH, Athens, Ohio, and had a minority (32.5%) interest in Station WMPO, Middleport-Pomeroy, Ohio. The application for power increase at the Station WATH did not result in an overlap of the 1 mv/m contours of Stations WATH and WMPO; it merely enlarged a pre-existing overlap. For this reason alone, the application did not violate the rule.

Even more important, however, Stations WMPO and WATH are simply not under common control --- either direct or indirect. For while Station WATH is controlled by Mr. Kovlan, he has only a minority interest in Station WMPO; occupies a relatively minor corporate office; and could not by any stretch of the imagination control the station, either directly or indirectly.

II

It was Error for the Commission to Attempt to Find, Without a Hearing, that Stations WATH and WMPO are under Common Control

Of course, situations sometimes arise where a minority stockholder can, in fact, exert a certain amount of control over a corporation (although that is not the case here). But even assuming, solely arguendo, that some such control could be exerted --- within the meaning of the rule --- by a minority stockholder, it was nonetheless gross arbitrary for the Commission to attempt to find such control without a hearing.

Clearly, the question of the extent of control which can be exerted by a minority stockholder depends upon the facts of a particular case. The Commission itself has held hearings in past such cases, to determine the extent of such control. See, e.g., James B. Childress, 8 Pike and Fischer 258 (1966); Salter Broadcasting Co., 10 RR 2d 195 (1967).

Indeed, under the terms of the Communications Act, a hearing must be held where there is such a question of fact. Section 309(a) of the Act provides that if the Commission can find that an application serves the public interest, convenience and necessity, it shall grant the application without a hearing. And Section 309(e) of the Act provides that "if, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefore...".

Thus, the Commission violated the clear and unequivocal mandate of the statute to either grant Appellant's application, or designate it for hearing.

III

The Commission's Refusal to Accept the Application upon Resubmission was Arbitrary and Capricious

This is another of those cases with which this Court is already familiar, in which the Federal Communications Commission requires an application to be filed by a cut-off date or deadline; the application is timely filed; the Commission then finds some real or imagined defect in it and returns it because of such alleged defect; and then refuses to accept the application when it is resubmitted with the defect cured, on the grounds that it is being late filed. Cf., Natick Broadcast Associates, Inc. v. FCC, No. 20,834 (D.C. Cir. Nov. 7, 1967). This Court has already commented on the unfairness of such tactics in Natick, and it should strike them down once more, in the instant case.

Here, Appellant's application was mutually exclusive with the application of Valley Broadcasting, Inc., for a construction permit for a new standard station at Nelsonville, Ohio. Accordingly, Appellant was entitled to have its application comparatively considered with the Nelsonville application, in comparative hearing proceedings. Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945).

Under these circumstances, the Commission surely had a duty to at least notify the Appellant that it was considering the question of compliance with the duopoly rule, before it abruptly dismissed Appellant's application. There is no question on the Commission's application form (FCC Form 301), requiting applicants to specifically demonstrate compliance with the duopoly rule. Thus, Appellant was not given any notice by the questions asked on the form that the Commission desired any specifc showing of compliance with the rule.

Moreover, the rule itself gives no notice that the Commission considers that it has the power to return an application for violation of same, without a hearing. Unlike the "go-no-go" rules employed in engineering situations (Cf., Section 73.37 of the Rules), which make it specifically clear that an application won't even be accepted for filing unless it is shown to comply with them, the duopoly rule merely says that a license won't be granted if the rule is violated.

Indeed, the Commission doesn't even bother to claim that the application, on its face, violated the rule. Rather, the Commission found it necessary to search its files for information upon which to predicate its flimsy and unsubstantiated findings that the Rule was violated. Such a procedure is not only arbitrary and capricious; it smacks of outright entrapment and

represents a transparent attempt to "get rid" of an application which the Commission ---- for some reason unknown and undisclosed to Appellant --- did not want to consider.

CONCLUSION

It is respectfully submitted that the Commission's actions herein were arbitrary, capricious and otherwise erroneous. For all of the foregoing reasons, the Commission's Memorandum Opinion and Order appealed from herein should be reversed, and the case remanded to the Commission with instructions to accept Appellant's application for filing nunc pro tunc, as of the date when it was originally tendered for filing; and to set aside the grant of the application of Valley Broadcasting, Inc., for a construction permit for a new standard broadcast station at Nelsonville, Ohio. Further, Appellant requests such other, further or different relief as to this Court shall seem just and proper.

Respectfully submitted,

RADIO ATHENS, INC. (WATH)

By Lauren A. Colby
Its Attorney

1334 G Street, N.W.
Washington, D.C. 20005

February 6, 1968

APPENDIX A

STATUTES INVOLVED

The relevant parts of the Statutes to which references are made in Appellant's brief follow:

Administrative Procedure Act of 1946, 5 U.S.C. § 1001, et seq., Section 10.

> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion -
>
> (a) Right of Review. - Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof...

Communications Act of 1934, as amended, 47 U.S.C. § 151, et seq., Section 309.

* * *

Section 309. (a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which Section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience and necessity would be served by the granting thereof, it shall grant such application.

* * *

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the

matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

Proceedings To Enjoin, Set Aside, Annul, or
Suspend Orders of the Commission

* * *

Section 402.

(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by Section 325 of this Act whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3) and (4) hereof.

(7) By any person upon whom an order to cease and desist has been served under Section 312 of this Act.

(8) By any radio operator whose license has been suspended by the Commission.

* * *

RULES AND REGULATIONS OF THE
FEDERAL COMMUNICATIONS COMMISSION

§73.35 Multiple ownership. - No license for a standard broadcast station shall be granted to any party (including all parties under common control) if:

(a) Such party directly or indirectly owns, operates, or controls one or more standard broadcast stations and the grant of such license will result in any overlap of the predicted or meansured 1 mv/m groundwave contours of the existing and proposed stations, computed in accordance with §73.183 or §73.186; or

* * *

§73.37 Minimum separation between stations; prohibited overlap. - (a) Except as indicated in other paragraphs of this section, and except for Class II-A stations, no application will be accepted for a new station (or change in frequency) if the proposed operation would involve overlap of signal strength contours with any other station as set forth below in this paragraph; and no application will be accepted for a change (other than a change in frequency) of the facilities of an existing station (including the daytime facilities of an existing Class II-A station) if the proposed change would involve such overlap in any area where there is not already such overlap between the stations involved:

Frequency Separation	Contour of Proposed New Station (Class II-B, II-D, III, and IV)	Contour of Any Other Station
Co-channel	0.005 mv/m	0.1 mv/m (Class I)
	0.025 mv/m	0.5 mv/m (Cl. II,III,IV)
	0.5 mv/m	0.025 mv/m (All Classes)
10 kc	0.5 mv/m	0.5 mv/m (All Classes)
20 kc	2 mv/m	25 mv/m (All Classes)
	25 mv/m	2 mv/m (All Classes)
30 kc	25 mv/m	25 mv/m (All Classes)

(b) An application for a new daytime station or a change in the daytime facilities of an existing station may be granted notwithstanding overlap of the proposed 0.5 mv/m contour and the 0.025 mv/m contour of another co-channel station, where the applicant station is or would be the first standard broadcast facility in a community of any size wholly outside of an urbanized area (as defined by the latest U.S. Census), or the first standard broadcast facility in a community of 25,000 or more population wholly or partly within an urbanized area, or when the facilities proposed would provide a first primary service to at least 25 percent of the interference-free area within the proposed 0.5 mv/m contour: provided, that:

(1) The proposal complies with paragraph (a) of this section in all other respects and is consistent with all other provisions of this part; and

(2) No overlap would occur between the 1 mv/m contour of the proposed facilities and the 0.05 mv/m contour of any co-channel stations.

(c) In determining overlap received, an application for a new Class IV station with daytime power of 250 watts, or greater, shall be considered on the assumption that both the proposed operation and all existing Class IV stations operate with 250 watts and utilize non-directional antennas. With respect to applications for new Class IV facilities, the provisions of paragraph (b) of this section shall be applied using the assumption mentioned in this paragraph for determining overlap received.

(d) If otherwise consistent with the public interest and subject to Section 316 of the Communications Act, an application requesting an increase in the daytime power of an existing Class IV station on a local channel from 250 watts to a maximum of one kilowatt, or from 100 watts to a maximum of 500 watts, may be granted notwithstanding overlap prohibited by paragraph (a) of this section. In the case of a 100 watt Class IV station increasing daytime power, the provisions of this paragraph shall not be construed to permit an increase in power to more than 500 watts, if prohibited overlap would be involved, even if successive applications should be tendered.

NOTE 1: The foregoing provisions of this section shall not be applied to applications for new Class II-A stations or to applications accepted for filing before July 1, 1964. With respect to such applications, the following shall apply: An authorization will not be granted for a station on a frequency of ±30 kc/s from that of another station if the area enclosed by the 25 mv/m groundwave contours of the two stations overlap, nor will an authorization be granted for the operation of a station on a frequency ±20 kc/s or ±10 kc/s from the frequency of another station if the area enclosed by the 25 mv/m ground-wave contour of either one overlaps the area enclosed by the 2 mv/m groundwave contour of the other. (As to overlap with Class II-A stations, see §73.21, Note 2.)

NOTE 2: In the case of applications for changes (other than frequency) in the facilities of standard broadcast stations covered by this section, an application therefor will be accepted even though overlap of signal strength contours as mentioned in this section would occur with another station in an area where such overlap does not already exist, if: (1) the total area of overlap with that station would be reduced; (2) there would be no net increase in the area of overlap with any other station; and (3) there would be created no area of overlap with any station with which overlap does not now exist.

NOTE 3: The provisions of this section concerning prohibited overlap of signal strength contours will not apply where: (1) the area of such overlap lies entirely over sea water; or (2) the only overlap involved would be

that caused to a foreign station, in which case the provisions of the North American Regional Broadcasting Agreement (NARBA) and the U.S./Mexican Agreement will apply. Where overlap would be received from a foreign station, the provisions of this section will apply.

BRIEF FOR APPELLEE

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Appellee,

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ON APPEAL FROM A MEMORANDUM OPINION AND
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STATEMENT OF QUESTIONS PRESENTED

The statement of questions presented as stipulated by counsel and approved by this Court has been set forth on the first page of appellant's brief.

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* Cases and other authorities chiefly relied upon are marked by an asterisk.

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Radio Athens, Inc., appellant, presently operates station WATH, Athens, Ohio, with 1000 watts of power. WATH appeals, as permitted by 47 U.S.C. §402(b)(1), from the Commission's refusal to accept its application to increase power to 5000 watts. Such application was returned because of noncompliance with the multiple ownership rules in that with increased power WATH would serve much of the area already served by commonly owned station WMPO (R. 182, 269-274).

Background: On May 11, 1967, WATH tendered its application to increase power to 5000 watts. Preliminary analysis of that application on the Commission's computer revealed minor engineering defects which WATH was asked to correct on June 1, 1967 (R. 181, 273).

After further processing, however, the application was returned on June 12, 1967, as unacceptable because it did not comply with 47 CFR §73.35(a), the Commission's multiple ownership rule (R. 182). The Commission's processing rules provide that:

> Applications which are determined to be patently not in accordance with the Commission's rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will be considered defective and will not be accepted for filing or if inadvertently accepted for filing will be dismissed. Requests for waiver shall show the nature of the waiver or exception desired and shall set forth the reasons in support thereof. 47 CFR §1.566(a).

In accordance with the foregoing, WATH's application was returned as unacceptable. The letter returning the application observed that:

> Commission records indicate that A. H. Kovlan, 70 percent stockholder, president, and director of Radio Athens, Inc., is also treasurer, director, and 32.5 percent stockholder of Radio Mid-Pom, Inc., licensee of Station WMPO, Middleport, Ohio. Additionally, we note that R. J. Jones, secretary of Radio Athens, Inc., is also secretary, director, and 2.5 percent stockholder of Radio Mid-Pom, Inc., licensee of WMPO.
>
> A study of your application indicates that increased overlap of 1.0 mv/m contours would occur with Station WMPO. Accordingly, your proposal is in violation of Section 73.35(a) of the Commission's Rules, and is hereby returned as not acceptable for filing. (R. 182)

Mr. Kovlan retendered the application by letter dated June 14, 1967, and acknowledged the violation. He stated in his letter:

> I am writing in regard to your letter of June 12, stating that my application is in violation of section [73.35(a)]. <u>I am aware of this</u>.

> I plan to sell all of the 32.5% stock that I own in Radio Mid-Pom, Inc., License of station WMPO, Middleport, Ohio, as soon as I obtain a construction permit for 5 KW. In fact, just yesterday I met with the other stockholders and discussed the sales terms.
>
> R. J. Jones is secretary of Radio Athens, Inc., but does not own any shares in the station; he is also our attorney and is willing to resign the position of secretary if necessary. * * *
>
> I am hereby sending the application back, requesting it be reinstated to its original date of May 10, 1967. (Emphasis added.) (R. 186)

In addition to Mr. Kovlan's own admission, other circumstances seem to indicate that WATH must have been aware of the multiple ownership problem when it tendered its application. In 1963 when WMPO, the other commonly owned station, sought to increase its power from 1000 to 5000 watts the Commission inquired (R. 211) about an apparent violation of §73.35(a). At that time the rule did not absolutely prohibit 1 mv/m overlap. Therefore, after additional engineering data regarding the extent of the overlap had been submitted by the same engineer who prepared the present application, the WMPO application was granted. But WATH's present proposal to increase its power five-fold greatly increases the overlap found in 1963 to be substantial but insufficient under the less strict provisions of Section 73.35(a) then in effect to bar a grant of the WMPO power increase (R. 271-272).

On July 7, 1967, almost two months after its May 11 cut-off date, the Commission granted the application of Valley Broadcasting, Inc., intervenor here, which proposed to operate the first local station in Nelsonville, Ohio,

with 250 watts of power. Local notice as well as Commission public notice of the tendering of this application had been given in November of 1966, more than six months before WATH submitted its application to increase power in May 1967.

On July 12, 1967, WATH sought reconsideration of the Commission's refusal to accept its application. For the first time, and contrary to Mr. Kovlan's previous unequivocal admission, it asserted that its application in fact did not violate §73.35(a) (R. 189-198). Thereafter, on August 4, 1967, WATH sought reconsideration of the Commission's grant of the Nelsonville application. For the first time WATH submitted engineering data tending to show that the two applications were in conflict (R. 214-217).

The Commission's Decision: A unanimous Commission denied WATH's requests for reconsideration (R. 269-274). It found that the application tendered May 11, 1967, clearly violated §73.35(a) of the multiple ownership rules, and therefore was not acceptable for filing. It rejected WATH's claim that the rule did not apply to its application to increase power because it merely proposed to increase pre-existing overlap (R. 270-271). It also rejected WATH's argument (R. 191) that the Commission had in 1963 concluded that Mr. Kovlan's "cross-ownership interest involved were [sic] not sufficient to bar a grant under former Section 73.35(a)." The Commission indicated that the 1963 power increase was authorized because the overlap was not sufficient under the former rule to bar a grant and that it did

not represent an acceptance of the assertion that Mr. Kovlan could not control WMPO. (R. 271-272). With respect to the latter, the Commission concluded that "this assertion is not in accord with the facts" and that:

> Certainly Mr. Kovlan's interest in the ownership of WMPO is substantial, and no other single stockholder has a greater interest. As an officer and director and a substantial stockholder, he clearly is in a position to have a considerable influence in the operation and control of the station. (R. 272)

The Commission also observed that the violation of §73.35(a) was obvious from an examination of the application, and the materials incorporated by reference (R. 272):

> Manifestly, the application when tendered was not in accordance with the Commission's rules (Section 73.35(a)). Mr. Kovlan belatedly advised the Commission that he planned to dispose of his interest in WMPO, but this advice comes too late. There was not the slightest suggestion that any change in ownership of WMPO was contemplated when the application was tendered. The burden is upon the applicant to make clear its intention with respect to pertinent factors in timely fashion. This WATH did not do. If the intention had been otherwise, the burden is similarly upon the applicant to request a waiver of any provision bringing the proposal into conflict with the rules in order to avoid the rejecting of the application pursuant to Section 1.566(a) of the Rules.

WATH's request that the Commission on its own motion waive Section 1.566(a), accept WATH's application nunc pro tunc as of May 11, 1967, and consolidate it for hearing with the Nelsonville application, was denied. The Commission, inter alia, relied on this Court's decision in Ranger v. F.C.C., 111 U.S.

App. D.C. 44, 294 F.2d 240 (1961), and under the circumstances of this case, it concluded that the public interest would not be served by a waiver of important processing procedures (R. 273).

SUMMARY OF ARGUMENT

I

The question presented by this case is whether the Commission was correct in dismissing appellant's application which violated a basic Commission rule, and also failed to contain information sufficient to justify a waiver of that rule. In Ranger v. F.C.C., 111 U.S. App. D.C. 44, 46, 294 F.2d 240, 242 (1961), this Court held that an application could be dismissed, without hearing, if it "failed to supply the Commission with information obviously necessary to consideration of its merits in the public interest." See also United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956) and F.P.C. v. Texaco, 377 U.S. 33, 39-40 (1964). The application submitted by WATH violated the multiple ownership rule, an important matter of public concern, without any explanation or justification. It was therefore unacceptable for filing. Ranger v. F.C.C., supra, 47 CFR §1.566(a).

II

When WATH retendered the application after its dismissal, it acknowledged the violation. And the record also establishes that it must have been aware of the violation when it first tendered the application, since the Commission had on a previous occasion inquired about a multiple ownership problem. Moreover, the fact

that this application was originally submitted on the last possible day before being cut-off from consideration with an application for Nelsonville, Ohio, gives it no special equities. WATH had a period of six months within which it could have prepared an acceptable application and failed to do so. The tendered application not only violated the multiple ownership rule, but it also failed to contain necessary engineering and program information. Nor has WATH identified any special public needs which might justify a waiver of important procedural requirements. Ranger v. F.C.C., supra. Finally, it appears from the record that a grant of Nelsonville's application will not prevent WATH from resubmitting its application to increase power if it makes minor changes in its objectionable interference contour in Nelsonville's direction.

ARGUMENT

I. WATH'S APPLICATION WAS DISMISSED BECAUSE IT VIOLATED THE MULTIPLE OWNERSHIP RULE AND FAILED TO CONTAIN FACTS WHICH, IF TRUE, JUSTIFIED A WAIVER OF THAT RULE.

Before this Court, appellant WATH argues that its application never violated the multiple ownership rule and that, in any event, the Commission could not find that the rule was violated without first holding a hearing. Specifically, WATH asserts that: "The most remarkable aspect of this case is that it involves the dismissal of Appellant's application by the Federal Communications Commission for alleged violation of a rule which the Appellant never, in fact, actually violated" (Br. 7).

WATH's contentions are not supported by the record which establishes, on the contrary, that Mr. Kovlan admitted the violation when he resubmitted WATH's application. The record also shows that Kovlan has substantial ownership interests in both WATH and WMPO. And we will show that on this record the Commission correctly concluded that the violation of the rule was obvious and clear so that a hearing was not required.

A. Section 73.35(a) Absolutely Prohibits Overlap Of The 1 mv/m Contours Of Commonly Owned Stations.

Section 73.35(a) absolutely prohibits common coverage of the same area by commonly owned radio stations when there is "any overlap" of the 1 mv/m contours of the commonly owned stations. 1/ Underlying the Commission's multiple ownership rules is the recognition that the Communications Act of 1934 was not enacted to create monopolies in the broadcast field, but instead was designed to preserve competition in broadcasting. 2/ The rules are also based on a view of the First Amendment similar to that expressed by the

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1/ 47 CFR §73.35(a) provides in pertinent part:

> No license for a standard broadcast station shall be granted to any party (including all parties under common control) if:
>
> (a) Such party directly or indirectly owns, operates, or controls one or more standard broadcast stations and the grant of such license will result in any overlap of the predicted or measured 1 mv/m groundwave contours of the existing and proposed stations . . .

2/ F.C.C. v. Sanders Radio Station, 309 U.S. 470, 476 (1940); F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940); Report and Order, 29 Fed. Reg. 7535 (1964) adopting the present form of §73.35(a).

the Supreme Court in Associated Press v. United States, 326 U.S. 1, 20 (1945) that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."

For many years §73.35(a) required case by case consideration of many factors. It was during this period of time that WMPO sought to increase its power and received a grant after having submitted engineering data showing that no 2 mv/m overlap would occur between WMPO and WATH (R. 271-272). As then written the rule included what was in effect a waiver clause; and decisions construing the rule indicated that overlap was not considered significant unless the 2 mv/m contours overlapped.[3/]

Dissatisfied with the ad hoc approach to the problem the Commission instituted rulemaking proceedings on July 16, 1962, 27 F.R. 6846, which led to the amendment of §73.35(a) in 1964. Under the new rule any new overlap of the 1 mv/m contours was absolutely prohibited. Report and Order, 29 F.R. 7535, 7539 (1964). It is this rule, adopted and published in 1964, which applies here.

In adopting the new rule, the Commission concluded that the ad hoc approach had proven unsatisfactory: "The fact of undesirable overlap becomes, in case by case adjudication, but one of a large number of evidentiary submissions considered to be of

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3/ See e.g. cases cited in North Atlanta Broadcasting Company, 37 F.C.C. 1145, 1147-1148 (1964).

decisional significance . . . The end result is, often, that the importance of an extensive overlap situation is obscured in a welter of competing factors and the principle that adequate separation is to be maintained between commonly owned stations disappears in the process." 29 Fed. Reg. at 7536 para. 9.

One observation made by the Commission is especially relevant in the factual context of this case, where numerous services are available to the persons who would receive additional service from WATH's power increase:

> "We are persuaded that it is no longer necessary to tolerate overlap situations allowed in the pioneering days of the broadcast service as the only means of initiating any service at all. We are seldom faced today with a stark choice between authorizing overlapping service from commonly owned stations or having no service at all in a particular area." 29 Fed. Reg. 7537 para. 13.

B. WATH's Application To Increase Power Violated Section 73.35(a).

WATH suggests, without further elaboration, that its application did not violate the multiple ownership rules because "it merely enlarged a pre-existing overlap" (Br. 8). It is clear, however, that WATH's five-fold power increase is a major change which would substantially increase the previous overlap. The Commission carefully detailed the reasons why the rule applies to this application (R. 270-271), and WATH does not seriously question these reasons on appeal. It does maintain that §73.35(a) is not violated because Mr. Kovlan does not control station WMPO (Br. 7-9). Undisputed facts establish that Kovlan, as president,

director, and 70% stockholder, controls WATH. In regard to WMPO, no single stockholder holds more shares than Mr. Kovlan; and he is also the treasurer and a director of WMPO.[4/]

After considering these facts, the Commission concluded that Kovlan's interest is "certainly" substantial enough to invoke the prohibition of §73.35(a) (R. 272). Moreover, the rule is not restricted to those who exercise actual or legal control. It also applies in cases of cross-ownership, cross-operation or management of radio stations. Cf. Macon Broadcasting Co., 10 F.C.C. 444 (1945); Minnesota Broadcasting Corp., 13 F.C.C. 672, 674 (1949); Shenandoah Life Insurance Co., 19 Pike & Fischer, R.R. 1 (1959); FCC Letter on Cross-Interest in Stations Serving the Same Locality, 25 Pike & Fischer, R.R. 515 (1963). In William F. Huffman Radio, Inc., FCC 67-918, August 2, 1967, cited by the Commission, the applicant controlled one station, had a 13.28% interest in the second station, and the rule was found to be applicable. Here Kovlan has a much larger interest with 32.5% of the WMPO stock.

Despite the artificial and hypertechnical arguments now advanced by WATH it seems clear that the tendered application was, as the Commission found, "manifestly" not in compliance with the

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4/ Control does not depend solely on majority stock ownership, or technical legal control. Lorain Journal Co. v. F.C.C., 122 U.S. App. D.C. 127, 351 F.2d 824 (1965), cert. denied sub nom. W.W.I.Z., Inc. v. F.C.C., 383 U.S. 967 (1966); Heitmeyer v. F.C.C., 68 App. D.C. 180, 188, 95 F.2d 91, 99 (1937).

rule (R. 272). And this conclusion was confirmed by Mr. Kovlan's spontaneous admission when he retendered the application after it had been dismissed.

C. A Hearing Was Not Required Before Dismissal Of WATH's Noncomplying Application.

Contrary to WATH's contention (Br. 9) the Commission is not compelled to hold a hearing before it dismisses an application which obviously violates a basic rule. United States v. Storer Broadcasting Co., 351 U.S. 192 (1956), involved the Commission's multiple ownership rule which restricts the maximum number of stations which can be owned by one person. After setting forth the provisions of Section 1.566(a) -- then 1.361(c) -- the Court agreed with the Commission that an application which violates the multiple ownership rule could be dismissed without an evidentiary hearing. A hearing would be necessary only if "the accompanying papers . . . set forth reasons, sufficient if true, to justify a change or waiver of the rules." 351 U.S. at 201 n.10, 205.

Recently in F.P.C. v. Texaco, 377 U.S. 33, 39 (1964) the Court again made clear that the adjudicatory hearing requirements do not "preclude the Commission from particularizing statutory standards through the rulemaking process and barring at the threshold those who neither measure up to them nor show reasons why in the public interest the rule should be waived." Here the application as tendered failed to comply with a basic rule, and failed to contain any information justifying a waiver.

It was therefore unacceptable, Ranger v. F.C.C., supra; 47 CFR §1.566(a). The only remaining question is whether the Commission was arbitrary and capricious in refusing to waive the applicable procedural rules so that it might accept the retendered application.

II. WATH AFTER AMPLE NOTICE FILED AN UNACCEPTABLE APPLICATION ON THE LAST POSSIBLE DAY AND IT HAS NOT SHOWN ANY SPECIAL CIRCUMSTANCES OR PUBLIC NEED WHICH MIGHT JUSTIFY A WAIVER OF IMPORTANT PROCEDURAL REQUIREMENTS.

Appellant WATH asserts that the Commission was arbitrary and capricious when it refused to waive the applicable rules and accept the retendered application which was submitted after the Nelsonville cut-off date. It relies on Natick v. F.C.C., __ U.S. App. D.C. __, 385 F.2d 985, Case No. 20,834, November 7, 1967. We submit that: (a) this case is not controlled by Natick; (b) WATH cannot point to any special equities; (c) nor has it identified any public need which justifies a waiver of Section 1.566(a) and the cut-off rules.

A. In Natick the application which was originally filed on time did not "in fact" cause interference prohibited by the rule. The material submitted subsequent to the cut-off date merely attempted to confirm the fact that no interference would be caused. Thus, the Court concluded that "The original complete application filed by Natick on the cut-off date . . . did not violate the [interference] rule."

Here WATH had some six months notice of the Nelsonville application; yet it did not submit an application until the last

possible day. That application was unacceptable. It violated the multiple ownership rule, a matter of basic public concern. Moreover, the application failed to include engineering data which would have shown a conflict between WATH's and the Nelsonville proposal. It failed to show WATH's objectionable interference contour in the Nelsonville area (R. 122-123). That showing was not submitted until nearly a month after the grant of the Nelsonville application, and three months after the May 11 cut-off date (R. 214-232).

On its facts, this case is not controlled by Natick. There a complete application which complied with the rule had been timely filed. Rather, this case is controlled by Storer and Texaco, supra, p. 12, where the Supreme Court held that at the threshold an applicant has to show compliance with an agency's basic rules, or set forth facts which, if true, justify a waiver. See also Ranger v. F.C.C., 101 U.S. App. D.C. at 46, 294 F.2d at 242.

B. On this record WATH can point to no special equities. It must have been aware of the multiple ownership problem since the Commission questioned a similar power increase in 1963 when WATH and WMPO operated with less power, and when the multiple ownership rule was not as strict as it is today. We note that the same engineer prepared both applications; nevertheless, WATH did not even try to justify a waiver of the rule when it tendered the present application. Finally, WATH had some six

months within which to prepare and file an acceptable application. This it did not do.

C. Nor did it point to any public need when it asked the Commission to reconsider and waive the applicable rules. Instead, it asserted that its application did not violate the multiple ownership rule. WATH already serves the community of Athens, Ohio, population 16,470 (1960 Census) with 1000 watts of power. It proposes to increase power to 5000 watts in an area which already receives numerous services including that of commonly owned WMPO. There is no material in the application from which it could be concluded that special programming needs will be served by the power increase. Despite the major change in power, WATH apparently does not propose any program changes. In fact, it did not even complete the program portion of the application (R. 41-53) contrary to instructions in the form (R. 31).

By contrast, the Nelsonville proposed 250 watts operation would establish the first station in a community of 4,834 (1960 Census). There is a strong presumption that each community needs a first local outlet for self-expression.[5/]

Public notice of the Nelsonville application was given by both the Commission and the applicant. Six months elapsed during which conflicting applications could have been filed. By filing on the last possible day, WATH would have obtained the

5/ Harrell v. F.C.C., 105 U.S. App. D.C. 352, 267 F.2d 629 (1959).

benefit of the Nelsonville cut-off date, while at the same time shielding its own application from any competing applications. It also would have gained the added advantage of keeping in hearing Nelsonville's application which would establish a competing facility in a nearby community, while WATH could continue operating its existing facilities with 1000 watts. But to obtain all of these advantages, it had to file an acceptable application, which it did not do. Ranger, supra, 101 U.S. App. D.C. at 46, 294 F.2d at 242.

Contrary to the implication in WATH's argument, a grant of the Nelsonville application will not necessarily preclude WATH from any future power increase. Its own amended engineering data (R. 228) shows that WATH and Nelsonville are approximately ten miles apart and that these proposals conflict only because their objectionable contours will interfere with each other for less than one mile. Minor or slight changes in WATH's directional pattern could clearly eliminate this conflict. Thus, the Nelsonville application does not preclude the resubmission of an amended application by WATH. That application could not take advantage of Nelsonville's cut-off date; it might have to compete with subsequently filed applications; but this, we submit, does not deprive WATH of any fundamental rights. F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 146 (1940).

CONCLUSION

For the foregoing reasons, the Commission's action should be affirmed.

Respectfully submitted,

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Federal Communications Commission
Washington, D. C. 20554

March 4, 1968

BRIEF FOR INTERVENOR

In the

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 21,476

RADIO ATHENS, INC. (WATH),

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

VALLEY BROADCASTING, INC.,

Intervenor.

APPEAL FROM MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

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STATEMENT OF QUESTIONS PRESENTED

The Questions are correctly stated by the Appellant.

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BRIEF FOR INTERVENOR

COUNTERSTATEMENT OF THE CASE

Radio Station WATH is located in Athens, Ohio. It is presently and has for a number of years been owned by the Kovlan brothers. A.H. Kovlan owns 70% of the licensee stock and is its President and a director (R. 2). R.J. Jones is the attorney (R. 186) for the Kovlan brothers and the Secretary (R. 2) of the licensee corporation.

Radio Station WMPO is located in Middleport-Pomeroy, Ohio, approximately 20 miles to the south of Athens, Ohio. The licensee of this facility is Radio Mid-Pom, Inc., of which A.H. Kovlan is, and has been over the entire period of concern here, a 32.5% shareholder and the Treasurer and a director of the company (R. 6). Mr. R.J. Jones owns 2.5% of the Radio Mid-Pom, Inc. stock, and is and has been its Secretary and a director (R. 6). Messrs. Kovlan and Jones comprise two of the four Radio Mid-Pom, Inc. directors (R. 6).

The WMPO Power Increase Application

On January 22, 1962, an application was filed with the Federal Communications Commission seeking authorization for the increase of power of WMPO from 1 kw to 5 kw. This increase in power would cause a significant increase in the service area of that station, resulting in a large overlapping of the WMPO and WATH service areas.

The FCC rules in effect at that time prohibited the grant of a standard broadcast station to a party where:

> "[s]uch party directly or indirectly owns, operates or controls another standard broadcast station, a substantial portion of whose primary service area would receive primary service from the station in question, except upon a showing that public interest, convenience and necessity will be served through such multiple-ownership situation" (FCC Rules Section 73.35(a), Pike & Fischer Radio Regs, paragraph 53:36, p.53:127.)

As a result, the Commission on April 1, 1963, corresponded with Radio Mid-Pom, noting that ". . .parties to the applicant hold interests in the licensee of station WATH, Athens, Ohio." (R. 211). It was pointed out that the increase in the WMPO service area would result in that station serving a portion of the WATH service area ". . .which appears to be substantial within the meaning of Section

3.35(a) of the Commission's rules (multiple ownership)." The letter stated that in view of the information on file it could not be determined that the public interest would be served by the grant ". . .in view of the resultant multiple ownership situation" (R. 211). The applicant was informed that action would be withheld and that an opportunity would be provided for an amendment to be filed. It was requested that the amendment should include the 2.0 mv/m contour overlap of the two stations; the 0.5 mv/m overlap of the stations, and other stations which provided primary service (0.5 mv/m overlap) to the service area of the WATH/WMPO operations (R. 211).

An amendment was duly submitted, setting forth the requested information. This material showed, among other things, that there would be no overlap of the 2.0 mv/m contours of the two stations. At the time this was a very important consideration in determining whether or not overlap between two commonly owned, operated or controlled stations was so substantial as to be objectionably against the public interest. On the basis of the showing made, and of the substantial overlap test in effect at that time, the Commission was apparently satisfied that either the overlap of the stations was not substantial within the meaning of the rule, or alternatively, that pursuant to the rule, a showing had been made that the public interest, convenience and necessity would be served through the "multiple ownership situation." As a result, the Commission granted the application for increase in the WMPO power to 5 kw on November 7, 1963.

The WATH Power Increase Application

On May 11, 1967, radio station WATH filed an application with the FCC seeking authorization to increase the power of that facility from 1 kw to 5 kw (R. 30). The interests of A.H. Kovlan and R.J. Jones (and indeed all of the other interests) in the two stations were

the same as they had been when the WMPO power increase application was filed.

The five-fold increase in power of WATH would result in a significant increase (R. 123-4) in the overlap of the WATH and WMPO service areas—over that resulting from the earlier WMPO power increase. In addition, since the time of the WMPO power increase the FCC multiple ownership rules had been amended. Instead of prohibiting commonly owned, operated and controlled stations from serving *substantially the same area*, (Pike and Fischer Radio Regs., par 53:36, p. 53:127), and instead of suggesting that a showing could be made warranting waiver of the multiple ownership situation, the new rules were specific and *absolutely prohibited such stations from having overlapping 1 mv/m contours* (47 CFR 73.35(a)).

Naturally, the WATH power increase application would result in a substantial overlap of the 1 mv/m contours of the two stations. Indeed, the 1 mv/m contours of these stations already overlapped[1] and the power increase would substantially exacerbate the overlap situation. Despite this, however, and despite the prior and recent problems which the principals of the applicant had experienced with the multiple ownership rule, the applicant nowhere in its application requested a waiver of the rule, nor did it in any way comment on the patent violation.

Accordingly, on June 12, 1967, the Commission returned the application to Radio Athens, Inc., noting the violation of Section 73.35(a) of the rules (R. 182). Section 1.566(a) (47 CFR 1.566(a)) of the rules permits the Commission to return applications which are

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[1] Note 3 to the multiple ownership rules (47 CFR 73.35(a), note 3) specifically applies to increases in power of existing stations and prohibits them from enlarging an existing 1 mv/m overlap, with certain exceptions that are not applicable to the instant case.

determined to be patently not in accordance with the Commission's rules, regulations or other requirements, unless accompanied by an appropriate request for waiver.

The Retender of the WATH Application

In a letter received at the Commission on June 16, 1967, Radio Athens, Inc. retendered its application requesting that it be reinstated to its original file date (R. 186). Mr. Kovlan, President of the applicant, indicated that he was aware of the violation but had plans to solve the problem (R. 186). The significance of this request for reinstatement is that at the time the WATH application was filed there was pending an application by Valley Broadcasting, Inc., for a new standard broadcast station to be located at Nelsonville, Ohio, some 11 miles to the northwest of Athens. This application was filed on November 21, 1966, and was to be the first local outlet for that town, proposing operation on 940 kc with 250 w of power, daytime only. Local notice concerning this filing was given pursuant to Section 1.580 of the rules, and it was accepted for filing on January 19, 1967, receiving the file number BP-17531. It was placed on a "cut-off list" on April 5, 1967, which required that all applications, in order to be considered versus it, must be complete and on file no later than May 11, 1967 (R. 23).

The WATH application was filed on May 11, and though it proposed operation on a frequency 30 kc removed (970 kc) from the Nelsonville proposal, there would result some minor overlapping of the 25 mv/m contours of the WATH proposed power increase and the Nelsonville proposal. Since Section 73.37(a) (47 CFR 73.37(a)) of the Commission's rules prohibits such 25 mv/m overlap, the two proposals—on close inspection—appeared to be mutually exclusive. *This apparent exclusivity, however, was nowhere pointed out in the WATH filing.*

Indeed, as will be demonstrated in the argument, the mutual exclusivity situation was, if anything, obscured, in that the WATH application only depicted a portion of its 25 mv/m contour, i.e. that portion *away* from the direction of Nelsonville (R. 122). There was no depiction of the WATH 25 mv/m contour in relation to the Nelsonville 25 mv/m contour. The mutual exclusivity was pointed out for the first time only after *return* of the WATH application.

Valley Broadcasting, Inc. opposed the reinstatement of the WATH application, arguing that it was defective as originally tendered and was not accompanied by a waiver request, hence could not be considered complete and on file as of the required cut-off date (R. 233). It was urged that pursuant to *Ranger v. Federal Communications Commission*, (111 U.S.App.D.C. 44, 294 F.2d 240 (1961)) that the application was late and could not now be considered versus the protected Nelsonville application. The Commission accordingly, on July 5, 1967, granted the Nelsonville application. Radio Athens challenged this action (R. 214 et seq) as well as the return of its application (R. 189 et seq) through petitions for reconsideration. These petitions were, in due course, denied (R. 269), and the instant appeal results.

SUMMARY OF ARGUMENT

When the WATH power increase application was filed, the Appellant knew that the proposal violated the Commission's multiple ownership rules. In fact, the President of the licensee of WATH conceded this fact in a letter resubmitting the application to the Commission after its return (R. 186). Moreover, the Appellant's officers and directors were clearly alerted to the multiple ownership problem through correspondence from the Commission when, in 1962, they filed an application for increase in power of station WMPO in nearby Middleport-Pomery, Ohio.

Accordingly, since the application was in patent violation of the multiple ownership rules as filed, and since there was no request for waiver or other explantion of the violation, the application was subject to return as defective under Section 1.566 of the FCC rules. Moreover, the deficiency for which the application was returned was not a trivial or technical matter, rather was a contravention of a fundamental FCC allocation principle, viz. the multiple ownership rules.

Having failed to file a complete application, the applicant, as in the *Ranger* case, assumed the risk of its failure. In the instant situation, as in the *Ranger* case, that risk was that the application was too late to be considered versus another applicant, viz. the Nelsonville application–the Nelsonville application having received a protected "cut-off" status as of May 11, 1967.

Further, the instant case is clearly distinguishable from the *Natick* case, *Natick Broadcast Associates, Inc. v. Federal Communications Commission,* __ U.S.App.D.C. __, __ F.2d __, (decided November 7, 1967, Case No. 20834), since in that case the application as originally submitted was *complete.* It was returned because there was an error in utilization of the FCC soil maps. This error was obviated by use of actual measurements showing that, *as originally filed,* the application was not in violation of the rules, i.e. did not cause interference. In the instant case the retendered application was *substantially different* from the original application. Thus, the original application proposed a patent violation of the multiple ownership rules. The resubmitted application offered to come into compliance with the rules by disposal of interests in WMPO, and accordingly was a different proposal than the one originally filed.

It is submitted that to permit the *nunc pro tunc* acceptance of an application such as Appellant's which has been returned because of a patent violation of the rules would permit any applicant to cor-

rect any problem which brought about the return of the application. This would completely undermine the Commission's cut-off rules, which are indispensable for the orderly and fair administration of the multitude of applications on file at the FCC.

ARGUMENT

I.

The WATH Application Was in Patent Violation of the FCC Multiple Ownership Rules and Was Subject To Return as Defective Under Section 1.566(a) of the FCC Rules; Moreover, WATH Had Actual Knowledge of Its Multiple Ownership Violation Through Correspondence With the Commission Concerning a Prior Filing at WMPO.

When the Radio Athens, Inc., application for increase in power of Station WATH from 1 kw to 5 kw was filed on May 11, 1967, the applicant was well aware of the fact that the application violated the Commission's multiple ownership rules. Thus, WATH is located in Athens, Ohio. Its President, Director and 70% owner is A.H. Kovlan (R. 2); R.J. Jones is Secretary (R. 2) and attorney for the company (R. 186). Approximately 20 miles to the south are the communities of Middleport-Pomeroy, Ohio, where WMPO (Radio Mid-Pom, Inc.) is located. Messrs. Kovlan and Jones own a total of 35% of the Radio Mid-Pom, Inc. stock—the licensee of WMPO—are its Treasurer and Secretary respectively, and comprise two out of a total of four directors (R. 6). On January 22, 1962, Radio Mid-Pom, Inc., filed for an increase in power of WMPO from 1 kw to 5 kw. As a result the Commission on April 1, 1963, corresponded with Radio Mid-Pom. The Commission noted that parties to the application also had interests in WATH. It further noted that the power increase would cause an overlap of the WMPO/WATH service areas,

which overlap appeared to be "substantial"[2] within the meaning of Section 73.35(a) of the rules (47 CFR 73.35(a)), and it could not. . .

> ". . .be determined that the public interest [would] be served by a grant of the [WMPO] application in view of the resultant multiple ownership situation." (R. 211)

As a result of this letter, Radio Mid-Pom, Inc. filed an amendment to its application, urging reasons why the Radio Mid-Pom application was in the public interest. A most important feature of this showing was that the 2 mv/m contours of the WMPO and WATH operations, though barely touching, nevertheless would not overlap as a result of the WMPO power increase. This was a very important criteria at that time in determing whether overlap was "substantial" within the meaning of 73.35(a).[3] Specific inquiry relative to the point was made in the Commission's April 1 letter (R. 211). As a result of the showing supplied by Radio Mid-Pom, the application for increase of power was granted on November 7, 1963.

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[2]Section 73.35(a) of the FCC Rules read at that time in pertinent part as follows:

> "Multiple ownership. - No license for a standard broadcast station shall be granted to any party (including all parties under common control) if:
>
> "(a) Such party directly or indirectly owns, operates or controls another standard broadcast station, a substantial portion of whose primary service area would receive primary service from the station in question, except upon a showing that public interest, convenience and necessity will be served through such multiple ownership situation; or".

(Pike and Fischer Radio Regs., Current Service Volume, par. 53:36, 53:127).

[3]See for example *North Atlanta Broadcasting Co.*, 4 R.R.2d 476 (1964) at 479; *The Greenwich Broadcasting Corp.*, 2 R.R.2d 548 (1964) at 564; *Avoyelles Broadcasting Corp.*, 1 R.R.2d 263 (1963) at 265.

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(Pike and Fischer Radio Regs., Current Service Volume, par. 53:36, 53:127).

[3]See for example *North Atlanta Broadcasting Co.*, 4 R.R.2d 476 (1964) at 479; *The Greenwich Broadcasting Corp.*, 2 R.R.2d 548 (1964) at 564; *Avoyelles Broadcasting Corp.*, 1 R.R.2d 263 (1963) at 265.

Subsequent to the grant, the FCC amended Section 73.35(a) of its rules to eliminate the language dealing with "substantial" overlap and substituted in lieu thereof a specific prohibition against overlap of the 1 mv/m contours of commonly owned, operated or controlled stations. Section 73.35(a) in its amended form read as follows:

> "No license for a standard broadcast station shall be granted to any party (including all parties under common control) if:
>
> "(a) Such party directly or indirectly owns, operates, or controls one or more standard broadcast stations and the grant of such license will result in any overlap of the predicted or measured 1 mv/m groundwave contours of the existing and proposed stations. . ." (47 CFR 73.35(a))

This rule not only applied to the new applications, but clearly prohibited existing stations from increasing power so as to create or worsen 1 mv/m overlap. Note 3 to Section 73.35(a) of the rules specifically covers the point:

> "Paragraph (a) [of 73.35]. . . .will apply to all applications. . .for major changes in existing stations except major changes that will result in overlap no greater than that already existing."[4] (47 CFR 73.35(a))

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[4]In the Report and Order adopting the new 1 mv/m overlap rule, the Commission specifically addressed itself to the question of whether or not the rule should apply to applications for major changes. After discussing some areas of problem the Commission stated,

> "We are aware of this problem but have concluded, nonetheless, that the new rule should be applied to proposals for major changes . . ." (Pike & Fischer Radio Regs., 2 R.R.2d 1588 (1964) at 1601).

This same point was reiterated in a Memorandum Opinion and Order denying petitions for reconsideration of the new rule (see 3 R.R.2d 1554 (1964) at 1561).

The instant case clearly does not fall within the exception to the rule, hence the 1 mv/m prohibition in Section 73.35(a) applies.

At the time the WATH power increase application was filed the 1 mv/m contours of WATH and WMPO already overlapped. This overlap had been brought about by the earlier granted WMPO power increase. The WATH proposed power increase promised to substantially increase the amount of overlap and was therefore clearly in violation of Section 73.35(a) and note 3 thereto quoted above. Yet, despite this fact and despite prior correspondence from the Commission regarding the multiple ownership problems existing between WMPO and WATH, the applicant did not bother to address itself to the point. The original application did not suggest that there might be a possible divestment of ownership of one of the facilities; nor was a request for waiver of the multiple ownership rules submitted. Accordingly, pursuant to the provisions of Section 1.566(a) of the FCC rules, the Commission returned the application as defective. This rule states as follows:

> "Applications which are determined to be patently not in accordance with the Commission's rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will be considered defective and will not be accepted for filing or if inadvertently accepted for filing will be dismissed. Requests for waiver shall show the nature of the waiver or exception desired and shall set forth the reasons in support thereof." (FCC Rules 1.566(a), 47 CFR 1.566(a))

Following the return of the application, Mr. Kovlan resubmitted it to the Commission on June 16. In his letter of transmittal he specifically stated that he was "aware of [the multiple ownership violation]", and that he planned to cure the deficiency. Thus, if there was any doubt of his knowledge of the violation based on problems

encountered with the WMPO power increase and the resultant correspondence from the Commission, this doubt is solved by the admission in the Kovlan letter filed June 16.

II.

The Appellant's Application Proposed a Patent Violation of a Fundamental and Important Concept of Broadcast Station Allocations as Embodied in the Multiple Ownership Rules (Section 73.35(a)) and, as Such, Was Subject to Summary Dismissal or Return.

The Appellant here argues that the return of its application was unfair and that the applicant was entitled to express notice prior to the return of the application. The fact is, however, that though the Commission does correspond with applicants concerning minor discrepancies or technical points in applications, it is not required to do so and in instances where the applicant obviously fails in major material respects to abide by the regulations—either by the failure to submit required information or by the patent violation of a rule—there is no duty to give notice prior to the return of the application.

The case of *Ranger v. Federal Communications Commission* is in point (111 U.S.App.D.C. 44, 294 F.2d 240 (1961)). In *Ranger,* Radio Cabrillo filed for an AM facility on April 29, 1959, for which facility two mutually exclusive applications were already pending. These two applicants were on a "cut-off list" and would receive a protected status as of May 15, 1959. Radio Cabrillo's application was returned by the FCC because, in its judgment, the omission of certain required information made the application defective. The Court, in affirming the Commission's action, stated:

> "We think an applicant for a radio license who either ignores or fails to understand clear and valid rules of the Commission respecting the requirements for an

> application assumes the risk that the application will not be accepted for filing." (id at 242).

Further:

> "Thus, they [the applicant] were on notice that an application by them must be in such condition by that date as to entitled them to a comparative hearing. When they failed to comply with the clear and valid rule they assumed the risks of that failure." (id at 244).

In the instant case the WATH application was filed on the last date for consideration versus the application of Valley Broadcasting, Inc., for a 250 watt, first local station in Nelsonville, Ohio. This Nelsonville application had been filed on November 21, 1966, with notice concerning the filing published in a local newspaper pursuant to the FCC rules. It was accepted by the Commission on January 19, 1967, with a notice duly published in the FCC releases. The application was noted on an FCC cut-off list on April 5, 1967 and would attain a protected status after May 11, 1967 (R. 23). Thus, the Appellant had ample notice of the pendency of the Nelsonville application. When it waited until the last day to file—and when it filed an application which patently violated the FCC rules—it ran the risk that the application would be returned.

As in the *Ranger* case *supra,* the Commission properly returned the defective application. Likewise, as in the *Ranger* case, the Commission was not chargeable with the consequences of the return of the application, viz. that it became too late for a cut-off date. Indeed, the Commission cannot even be charged with *knowledge* of the cut-off date or Appellant's conflict with the Nelsonville application,

because Appellant did not even bother to inform the Commission of the conflict,[5] cf. *Ranger* at 244.

The Appellant argues that the return of its application effectively violates its *Ashbacker* rights to a comparative hearing (*Ashbacker Radio Corporation v. Federal Communications Commission*, 326 U.S. 327 (1945)). As stated in *Ranger*, however, the cut-off rules were designed to meet the problems created by the *Ashbacker* case, and the failure to meet a cut-off date with a proper and complete application means that the right to a comparative "*Ashbacker*" hearing is lost. Indeed, the *Ashbacker* case itself suggested that at that time there was no existing regulation "which, for orderly administration, requires an application for a frequency, previously applied for, to be filed within a certain date" (id 333 Note 9). The so-called "cut-off rules" cured this deficiency.[6] See also *Century Broadcasting Corporation v. Federal Communications Commission*, 114 U.S.App. D.C. 29, 310 F.2d 864 (1962) at 866; also *Ridge Radio v. Federal Communications Commission*, 110 U.S.App.D.C. 277, 292 F.2d 770 (1961) at 772 et seq.

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[5]In fact, if anything, the Appellant obscured the conflict with the Nelsonville application. Thus, the nature of the mutual exclusivity is that the applications, even though 30 kc apart in frequency, would have a 25 mv/m overlap (FCC rules Section 73.37(a), 47 CFR 73.37(a)). The Appellant's application only showed a portion of its 25 mv/m contour and did not even depict it in the direction of Nelsonville (R. 122). Accordingly, one could not ascertain from an examination of the Applicant's application that there was a conflict. The Appellant suggested the conflict for the first time *after* the return of its application.

[6]The original "cut-off" date was the day before a prior filed application was granted or designated for hearing. On April 9, 1959, the rules were changed, with cut-off dates being specified on lists published regularly by the Commission. See *Ranger*, 294 F.2d at 243.

The Appellant here attempts to cast the rule violation in terms of being minor or trivial, making it appear that the return of its application was unfair and unnecessary. The fact is, however, that the multiple ownership rules and the desire of the Commission for diversification of the broadcast media are, and have long been, a fundamental and extremely important broadcast allocation principle; a proposed violation of the rule is equally fundamental and important. For example, the Commission has stated the following:

> "Aside from the specific questions of common ownership of newspapers and radio stations, the Commission recognizes the serious problem involved in the broader field of the control of the media of mass communications and the importance of avoiding monopoly of the avenues of communicating fact and opinion to the public. All Commissioners agree to the general principle that diversification of control of such media is desirable. The Commission does not desire to discourage legally qualified persons from applying for licenses, but does desire to encourage the maximum number of qualified persons to enter into the field of mass communications, and to permit them to use all modern inventions and improvements in the art to insure good public service." Newspaper Ownership of Radio Stations, FCC Notice 9, Federal Register 702, 703 (1944); quoted in *Clarksburg Publishing Company v. Federal Communications Commission,* 96 U.S.App.D.C. 211, 225 F.2d 511 (1955) at 517, fn.19.

And again, in the Notice of Proposed Rule Making in Docket 14711 leading to the specific 1 mv/m overlap prohibition, the Commission said:

> "Sections 3.35(a), 3.240(a) and 3.636(a) of the Commission's Rules provide limitations on the com-

mon ownership or control of multiple AM, FM, and television broadcast stations which serve substantially the same area. These provisions of the rules, commonly referred to as the 'duopoly' or 'overlap' rules, *are intended to preserve and augment the opportunities for effective competition in the broadcast industry and to implement the Commission's policy in favor of maximizing diversification of program and service viewpoints. The latter policy assumes a very special importance in a democratic society. It is well established that '[t]he widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . .'* *Associated Press v. United States,* 326 U.S. 1, 20; *Scripps-Howard Radio, Inc. v. F.C.C.,* 89 U.S.App. D.C. 13, 19, 189 F.2d 677, cert. den., 342 U.S. 830. The provisions of the multiple ownership rules are designed to prevent such overlap of service areas of commonly owned facilities as might result in relatively few persons or groups having an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level." (FCC 62-747, Number 22304, 27 Fed. Register 6846, 7/19/62 at par. 2). (Emphasis supplied)

In this Notice the Commission further stated that it was persuaded to adopt the new fixed (1 mv/m overlap) standard by 20 years' experience with the *ad hoc* type of approach necessary under the previously existing substantial overlap test. The Commission had at an earlier time adopted a specific rule with regard to the total number of AM, FM and TV stations which could be commonly owned and its experience with these specific rules had been very satisfactory. The Commission felt that this same type of approach was desirable with regard to the amount of overlap to be allowed by stations in a given area or region. In their Notice they stated:

> "It has been our experience that this type of regulation has worked well. It has provided the public and the industry with a firm base upon which they can 'cogently plan. . .present or future operations' (*U.S. v. Storer Broadcasting Co.*, 351 U.S. 191) and has facilitated the Commission's application of the rule. We think that there would be comparable benefits if the other portion of the rules dealing with overlap were case in similar terms of specific limitation. Such a rule change would be a desirable 'particularization of [our] conception of the 'public interest' (*NBC v. U.S.*, 319 U.S. 190, 218)" (*id.* at par. 3)

It is submitted that the Commission may summarily return an application which on its face violates a fundamental FCC policy such as its multiple ownership rules, which rules were carefully arrived at and based on over 20 years' experience with alternative approaches. In short, it is submitted that the FCC need not provide comparative consideration to an applicant who does not establish his basic qualifications to the Commission (*Guinan v. Federal Communications Commission*, 111 U.S.App.D.C. 371, 297 F.2d 782 (1961)); and that it need not "waste time on applications that do not state a valid basis for hearing", (*United States v. Storer Broadcasting Company*, 351 U.S. 192, (1956) at 205).

III.

The Degree of Cross Interests of Messrs. A.H. Kovlan and R.J. Jones in Station WATH and WMPO Constitute Prohibited Cross Interests Within the Meaning of Section 73.35(a) of the Rules.

The Appellant further argues that the WATH/WMPO situation is not within the purview of Section 73.35(a) of the rules because the stations are not in fact under common control. This is simply not so.

The Commission found in its Report and Order—denying reconsideration of the return of the WATH application—that Mr. Kovlan is clearly in a position to have a considerable influence in the operation and control of both stations; and this is what the rule was designed to prevent. Mr. Kovlan is President, a director and 70% owner of WATH. Mr. R.J. Jones is Secretary and attorney for WATH. Messrs. Kovlan and Jones own 35% of the stock of WMPO, are the Treasurer and Secretary respectively of that company, and comprise two out of the four directors. Thus, officers and directors of WATH have control (negative control) of the operating policies of Station WMPO. This is clearly within the prohibition contemplated by the multiple ownership rule.

The purpose of the multiple ownership rules is to insure that there is diversification of the ownership of stations thereby maximizing the "diversification of program and service viewpoints" (Notice of Proposed Rule Making in Docket 14711, *supra*). The basic concept is best expressed in the Report and Order issuing the new 1 mv/m overlap standard:

> "The concept embodied in the rules is not complex: When two stations in the same broadcast service are close enough together so that a substantial number of people can receive both, it is highly desirable to have the stations owned by different people. This objective flows logically from two basic principles underlying the multiple ownership rules. First, in a system of broadcasting based upon free competition, [*Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940)] it is more reasonable to assume that stations owned by different people will compete with each other, for the same audience and advertisers, than stations under the control of a single person or group. Second, the greater the diversity of ownership in a particular area,

> the less chance there is that a single person or group can have 'an inordinate effect, in the political, editorial, or similar programming sense, on public opinion at the regional level.' [Notice of Proposed Rule Making, Docket 14711, FCC 62-747 (July 13, 1962)]. In this respect, the rules are based upon a view of the first amendment to the Constitution similar to that of the Supreme Court in the Associated Press case - i.e. a notion that the Amendment 'rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.' [*Associated Press v. United States*, 326 U.S. 1, 20 (1945)]. Report and Order in Docket 14711, Pike & Fischer Radio Regs., 2 R.R.2d 1588 (1964) at 1591.

In line with this policy, the Commission has long interpreted its multiple ownership rules—whether under the substantial overlap test or the 1 mv/m test—

> ". . .against permitting *any** degree of cross interest, direct or indirect, in two or more stations in the same broadcast service *serving substantially the same area.***[7] Said policy was adopted by the Commission for the purpose of insuring arms-length competition among such broadcast stations and has been followed over the course of many years in cases similar to that outlined in your letter. While it may be true that, at a given time, no impairment of competition exists in fact, it is the potential of such impairment which the Commission's policy is designed to guard against." (*Shenandoah Life Insurance Co.*, 19 R.R.1 (1959) at 2. (*Emphasis Present)(**Emphasis Supplied)

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[7]And clearly, stations with overlapping 1 mv/m contours are by definition, serving substantially the same area.

Moreover, further pursuant to this policy the Commission has even prohibited a 1/3 owner and director of a station in town A from acting as an employee in town A of a station in town B (23 miles from town A) where the town B station placed a 2 mv/m signal over town A (*Carolina Broadcasting Service, Inc.*, 25 R.R.515 (1963)).

Nor in any event can the Appellant here claim surprise at the Commission's attitude on this point, since when the WMPO power increase application was filed, the Commission in its letter of April 1, 1963 to the applicant indicated that the parties thereto held interests in WATH—and that the overlap proposed by the power increase appeared to be substantial. In other words, the Commission indicated in its letter that if it found that the overlap was substantial and a waiver was not warranted, then *with the ownership situation existing* the application could not be granted. There has been no change in the ownership situation since then—only a proposal which greatly exacerbates this 1 mv/m overlap situation and a rule change which specifically prohibits an increase in 1 mv/m overlap between stations with the type of common ownership present here. There is no doubt that the application as filed violated the multiple ownership rules and indeed, Mr. Kovlan admitted that he was aware of the violation (R. 186).

It is submitted that the Commission was perfectly correct in rejecting the WATH application in view of (1) the basic purpose of the rule in fostering maximum ownership diversification and competition among stations; (2) the traditionally strict interpretation of the rule prohibiting *any* degree of cross ownership where prohibited overlap exists; (3) prior notice with regard to the multiple ownership problem received by Messrs. Kovlan and Jones when the WMPO power increase application was filed; and (4) the fact that the President (and 70% owner), and the Secretary and attorney of

WATH were two out of a total of four directors of WMPO. Since the applicant failed to address itself to this rule violation either by explanation of its plans or by a waiver request, the application was subject to return as defective.

Nor, it is submitted, is the instant situation like the recent *Natick* case (*Natick Broadcast Associates, Inc., v. Federal Communications Commission,* __ U.S.App.D.C. __, __ F.2d __ (Decided November 7, 1967, Case No. 20834)), wherein the Court held that the Commission's refusal to accept an application *nunc pro tunc* to a "cut-off" date was "hypertechnical and arbitrary." In *Natick* the application was returned because, due to an error in the applicant's engineer's use of the FCC's soil conductivity maps, the proposal appeared to cause some objectionable interference to a station in Philadelphia, hence was not acceptable for filing. After the return of the application the applicant made field intensity measurements—as permitted by the rules—establishing that the "*original complete* application filed by Natick on the cut-off day. . .did not violate the overlap rules." (*Natick supra* (Emphasis supplied)).

In the instant case, however, the application as *originally filed* in fact violated the Commission's multiple ownership rules (FCC rule Section 73.35(a)). After the return of the application the applicant retendered a *substantially different proposal,* suggesting *for the first time* that Messrs. Kovlan and Jones were willing to divest themselves of their interests in Station WMPO, in return for its acceptance *nunc pro tunc* to the Nelsonville application cut-off day. If the Court permits this type of *nunc pro tunc* acceptance, then any party filing a defective application can, upon its return, merely correct the matter which made the application defective and seek acceptance *nunc pro tunc* to the original date of submission. Applying this interpretation to the *Ranger* case, Radio Cabrillo could have supplied the material omitted from the original application and obtained acceptance *nunc*

pro tunc to the original filing date, thereby entitling it to comparative consideration versus the other two applicants. It is submitted that such an interpretation would make a shambles of the Commission's cut-off rules and would once again embroil the FCC in the "practical and difficult administrative problems" (*Ranger v. FCC supra*) created by the *Ashbacker* case—which problems the rules were designed to alleviate.

CONCLUSION

In conclusion, it is submitted that the WATH application as filed was patently in violation of the Commission's multiple ownership rules (47 CFR 73.35(a)). Thus, the degree of cross ownership and control between the WATH proposal and WMPO was prohibitive. The Appellant knew this, as a result of the prior increase in power at WMPO and the resultant Commission correspondence concerning the matter; indeed, in retendering the rejected application, WATH's President indicated that he was "aware" of the multiple ownership violation. The 1 mv/m prohibition clearly applied to proposals for major changes in facilities such as the applicant's proposal (47 CFR 73.35 (a), note 3) and the applicant was chargeable with knowledge of this clear rule. Accordingly, since the application was defective under the rules and since no request for waiver or other explanation was forthcoming the Commission's action in returning the application was entirely proper. The risk the applicant ran in waiting until the last possible day to file against the long-pending Nelsonville application was, as in the *Ranger* case, that he would miss a cut-off date and not be given comparative consideration versus that application.[8] It is submitted that the Commission's cut-off rules are vital

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[8]In one of his final arguments the Appellant speculates that for some unknown reason the Commission wanted to "get rid" of his application, implying that by granting the Nelsonville application WATH was forever precluded

for the orderly administration of the sea of applications on file at the FCC and the comparative consideration requirements dictated by the *Ashbacker* case *supra.* For these reasons the Commission's action below should be affirmed.

Respectfully submitted,

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from increasing its power. This is nonsense. Though it is not part of the record, there is attached hereto an engineering affidavit which states that the WATH application could have easily avoided the 25 mv/m overlap with the pending Nelsonville proposal—and indeed can still do so—by a slight modification in the proposed directional antenna pattern; further, that such modification would result in only minor changes in the overall proposed service area of the proposal. In other words, by making slight changes in its directional pattern, the WATH application would presumably be acceptable and could be processed through to grant—assuming, of course, that the multiple ownership problem is eliminated. The Appellant, for some reason, did not choose to pursue this apparently easy course of action, rather elected to challenge all the way to this Court, its procedural right to be mutually exclusive with, hence be considered comparatively versus, the Nelsonville application.

APPENDIX

CITY OF WASHINGTON)
) SS
DISTRICT OF COLUMBIA)

GEORGE P. ADAIR, having been duly sworn, deposes and says:

1. That he is a Registered Professional Engineer in the District of Columbia and in the State of Maryland; and partner of the Consulting Firm of George P. Adair Engineering Company. His qualifications are a matter of record with the Federal Communications Commission.

2. That he has been retained by Valley Broadcasting, Inc. grantee of Radio Station WNAL, Nelsonville, Ohio, 940 KC, 250 watts, directional antenna, daytime only, to examine the application of Radio Athens, Inc. licensee of Radio Station WATH, Athens, Ohio 970 KC, 1 KW, omnidirectional antenna, daytime only to move the station locally and to install a directional antenna and new transmitter and to increase power to 5 KW, to determine whether or not there is any overlap of the pertinent contours of WNAL and WATH resulting from the proposed operation of WATH.

3. That the pertinent contours are specified in Sections 73.37 of the Federal Communications Rules and Regulations. Since the operating frequencies of WNAL and WATH are separated by 30 KC Section 73.37 requires that the 25 mv/m contours of these stations not overlap.

4. That reference to Figure 1 attached hereto shows that there is overlap of the 25 mv/m contours of these stations.

5. That the loci of the 25 mv/m Contours of WMAL and WATH were determined in accordance with the Rules and Regulations of the Commission from the data submitted by these two stations to the Commission. These are on the basis of the specified MEOV

(maximum expected operating values) and the conductivity of 3 MMHOS/M and dielectric constant of 15 as determined from measurements made and submitted by WATH.

6. That the small amount of overlap which would occur if the application of WATH were accepted and granted by the Commission could have been easily avoided and still can be easily avoided by relatively slight modification in the proposed directional antenna pattern. This would result in only minor changes in the overall proposed service area of WATH. It would appear that in the preparation of this application WATH did not give consideration to the effect of its proposed operation on the operation of WNAL even though it gave extended consideration to a number of other stations much further removed.

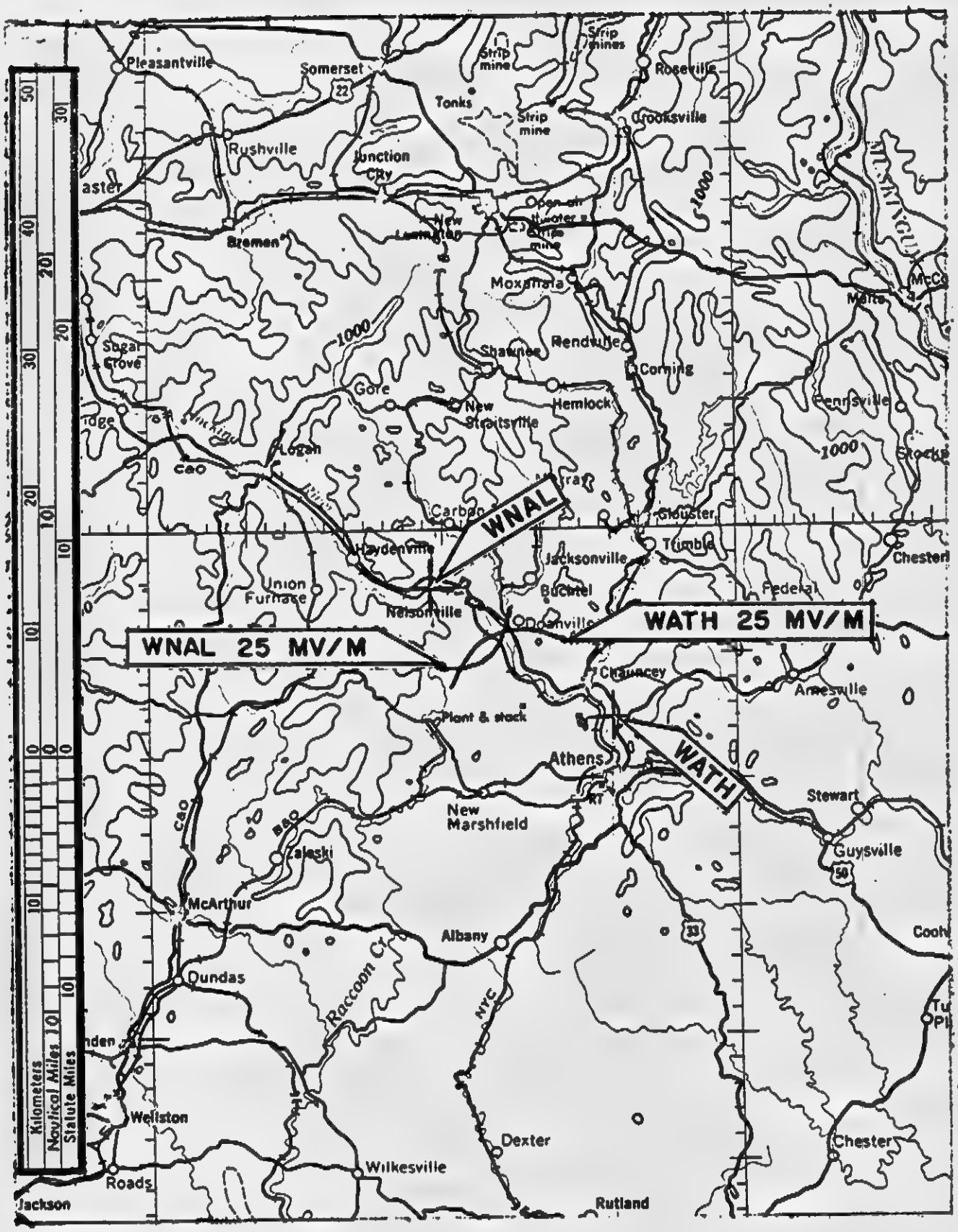
7. That the foregoing statements and the aforementioned exhibit are true and correct of his own knowledge except such statements as are on information and belief, and as to such statements, he believes them to be true.

/s/ George P. Adair
George P. Adair

District of Columbia Registration No. 275
State of Maryland Registration No. 5317

Subscribed and sworn to before me
This 19th Day Of Feb. 1968

/s/ Milton French
Notary Public
My Commission expires Sept. 14, 1972



VALLEY BROADCASTING, INC. NELSONVILLE, OHIO	FIGURE 1 DATE 13 FEB 1968
CONSULTING ENGINEERS — GEORGE P. ADAIR ENGINEERING COMPANY — WASHINGTON, D. C.	

REPLY BRIEF FOR APPELLANT

In the
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 21,476

RADIO ATHENS, INC. (WATH),

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

VALLEY BROADCASTING, INC.,

Intervenor.

APPEAL FROM MEMORANDUM OPINION AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

LAUREN A. COLBY
1334 G Street, N.W.
Washington, D.C. 20005

Attorney for Appellant

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REPLY BRIEF FOR APPELLANT

REPLY TO BRIEFS OF FEDERAL COMMUNICATIONS COMMISSION AND INTERVENOR

A. The Commission's Claim that Appellant's President Admitted a Violation of the "Duopoly Rule" is Unfair and is Completely Unsupported by the Record.

In its reply brief, the Commission raises a number of new claims, never previously raised in the proceedings below, and pertaining to issues of fact --- issues which, if they are

relevant, should properly be tried before a Commission Hearing Examiner, and not before this appellate tribunal. Among these claims is the grossly unfair contention that Mr. A. H. Kovlan, the President of the Appellant, has admitted that the application, as originally filed, violated the duopoly rule. Such contention is predicated on an interpretation of a letter written to the Commission by Mr. Kovlan. The interpretation which the Commission seeks to place on that letter is wholly unwarranted. To understand the letter, or to properly evaluate the other claims raised by the Commission in its brief, a factual background is necessary.

The facts are that Mr. Kovlan and Radio Athens, Inc., have for some years been working on the possibility of increasing the power of Station WATH, and also possibly expanding the station's facilities from daytime only operation to full time operation. The filing of the application of Valley Broadcasting Company brought Mr. Kovlan's plans to a head, however, because the establishment of a station on the frequency 940 kc in Nelsonville threatened to limit or preclude a power increase by Station WATH on 970 kc in Athens. Accordingly, when it was announced by the Commission that the Nelsonville application

was to be "cut off" on May 12, 1967, Appellant instructed its consulting engineer to get busy and meet that filing date. This, he did, and the application for power increase was timely filed.

The original application was prepared by Mr. Kovlan without benefit of legal counsel. Contrary to the Commission's belated contention that the application was incomplete,[1/] Mr. Kovlan answered all the questions which he was required to answer, and supplied all required information. He was not asked any questions about compliance with the "duopoly rule" and was not, therefore, required either to demonstrate compliance with the rule or state what steps he would take to comply.

When, on June 12, 1967, the Commission abruptly returned the application (R. 182), Mr. Kovlan's reaction was immediate. He fired off a letter, dated June 14, 1967 (the same day he received the application in the mail) (R. 186), resubmitting the application and stating, in effect, that he was "aware" of the violation of the rules charged against him in the Commission's

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1/ See first full paragraph, Page 15 of Commission brief, where the assertion is made --- again for the first time in this proceeding --- that Appellant failed to provide required programming information. Such information simply is not required by the Commission in the case of a power increase, unless programming changes are to be made. In such cases, the Commission presumes that the programming needs and interests in the persons in the area to gain service from the power increase are the same as the needs and interests of the applicant's present audience. Darrell E. Yates, 6 Pike & Fischer RR 2d 882 (1965); WKYR, Inc., 37 FCC 132, 144 (1964); The Edgefield-Saluda Radio Company, 7 Pike & Fischer RR 2d 544 (1966).

letter. To expand upon this layman's statement and try to distort it into an admission that the application did, in fact, violate the rule, is a gross distortion. In the first place, the statement itself cannot be properly read as anything more than an acknowledgement that Mr. Kovlan understood the charge the Commission made. In the second place --- and most important --- Mr. Kovlan was utterly unqualified to determine whether the application violated the rule; questions of compliance with the rule are extremely complicated and have been the subject of many decisions, with which only an attorney could be expected to be familiar. See, e.g., James B. Childress, 8 Pike & Fischer RR 258 (1966); and Salter Broadcasting Co., 10 Pike & Fischer RR 2d 195 (1967). Finally, had the Commission elected to be consistent with its past precedents, Mr. Kovlan's offer --- set forth in his letter --- to eliminate any cross ownership between Stations WATH and WMPO, should have sufficed to cure any alleged violation of the rule, and the application should have been accepted for filing, upon resubmission. See, KWHK Broadcasting Co., 8 Pike & Fischer RR 2d 204 (1966), in which the Commission held that a violation of the "duopoly" rule can be properly cured by offering to dispose of another broadcast interest in the event of a grant of an application which would involve a 1 mv/m overlap therewith.

B. The Question of Devising a Possible Accommodation Between the Valley Broadcasting Company and Radio Athens Applications Can and Should be Resolved at the Commission Level and is Not Properly a Matter for Consideration in this Court.

Both the Intervenor and the Commission seek to have tried in this Court the question of whether Radio Athens can or should amend its engineering proposal to eliminate overlap with the application of Valley Broadcasting Company. Because there was no evidenciary record below, both the Commission and Intervenor have felt free to make such speculative assumptions as they wished --- the Commission going so far as to insinuate at Page 16 of its brief that Appellant's application was filed for the purpose of keeping out a competing station in Nelsonville, a charge which has never previously been made in these proceedings; which the Commission ought not to make without any evidence to substantiate it; and which Appellant unequivocally denies.

The facts are that the Radio Athens application had been under preparation for several years. A principal problem, preventing the application from being finalized, was the need to find a suitable tract of land on which to locate the transmitter and antenna facilities. Suitable land is scarce in the Athens area. Several sites were selected by Mr. Kovlan over the years, but were rejected by Appellant's consulting engineer,

as unsuitable. The radiation pattern which was eventually developed in the application filed by Radio Athens was developed to take advantage of the site finally selected, to provide coverage in the areas desired to be served, and to utilize a configuration of antenna towers which is suitable for future expansion to full time operation.

Had the Commission accepted the Radio Athens application for filing, it is entirely possible that some accommodation could have been found to permit a grant of both the Radio Athens application and that of Intervenor, Valley Broadcasting Company. Valley could, for example, eliminate the overlap by moving its transmitter site slightly, or by modifying its antenna pattern. Certainly, Appellant has no objection to any such modification by Valley to enable a grant of both applications.

Such matters are, however, matters to be considered at the Commission level, after both applications are accepted for filing and considered on a consolidated basis. The question of possible modification of either or both proposals at some future time should not be permitted to obscure the basic issue before this Court. That issue is simply whether the Commission can summarily return an application for alleged violation of its duopoly rule without any hearing to determine whether the rule is really

violated, and without giving the applicant any notice that the question of compliance with the rule is being considered. Appellant respectfully submits that such issue must be decided against the Commission. Natick Broadcast Associates, Inc. v. FCC, ___ U.S. App. D.C. ___, 385 F.2d 985 (1967). Communications Act, Section 309.

Respectfully submitted,

RADIO ATHENS, INC. (WATH)

By Lauren A. Colby
Its Attorney

1334 G Street, N.W.
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March 18, 1968